Office Supreme Court, U. S.
FILED.
FEB 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

NO. 172.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts,
Appellant,

vs.

SWOFFORD BROS. DRY GOODS CO.,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Appellant.

JAMES K. JONES,
WILLIAM H. ARNOLD,
Attorneys for Appellant.

J. D. MILANS & SONS, LAW PRINTERS, 515 E ST., N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 172.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

vs

SWOFFORD BROS. DRY GOODS CO., APPELLEES

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

Statement of the Case.

E. M. Newton & Company, merchants, filed their voluntary petition in bankruptcy in the United States District Court for the Western District of Arkansas, Texarkana Division, July 3rd, 1905, and on the same day the clerk referred the petition to the referee in bankruptcy (R. 12),

and on said day the referee in bankruptcy adjudicated said petitioners bankrupt and appointed Thad A. Bryant receiver of the stock of merchandise and choses in action of said bankrupts (R. 13).

The controversy in this case arises upon the intervention of Swofford Bros. Dry Goods Co., claiming the title to merchandise invoicing $5,337.21, open accounts for goods sold by Newton & Co., to their customers, $8,-477.04, and notes $1,684.32, or rather the proceeds of said goods and choses in action now in the hands of the trustee in bankruptcy awaiting the final decision of this cause. Swofford Bros. Dry Goods Co. listed as a secured creditor (R. 3-4). There are unsecured creditors whose claims amount to about $15,000.00 (R. 6).

At the first meeting of creditors, July 13th, 1905, Thad A. Bryant was appointed trustee of the estate (R. 13).

Swofford Bros. Dry Goods Co. filed their intervention before the referee August 10th, 1905 (R. 177), claiming said goods and choses in action. Thereafter the referee acting as master heard the case and made a report of his findings in which he allowed the claim of the intervenors for all the goods and notes and one-half of the accounts (R. 146-152). Exceptions were filed to the report by the trustee (R. 153-5), and by the intervenors (R. 155-7), and the case was heard before the District Court and the findings of the master were set aside and judgment was rendered in favor of the trustee for all the property in controversy. (See opinion of the District Court, 157-161). On appeal to the United States Circuit Court of Appeals for the Eighth Circuit the judgment of the District Court was reversed and all the property, goods,

notes and accounts were adjudged to be the property of the intervenors. (See opinion of the Court of Appeals, R. 193-6, and final judgment of that court, R. 197.)

The findings of fact and conclusions of law are contained in R. 198-202.

The trustee in apt time filed his petition for appeal to the Supreme Court of the United States and his assignment of errors and the appeal were duly allowed (R. 204-6).

The Pleadings.

It is alleged in the intervention in substance that on July 20th, 1904, a contract was entered into between Swofford Bros. Dry Goods Co., of Kansas City, Mo., and Newton & Co., of New Lewisville, Arkansas, whereby the intervenors agreed to deliver to said Newton & Co., merchandise upon the condition that the title and right to possession should remain vested in the intervenors, and that the title and right to possession of all cash, notes and accounts received by said bankrupts as the proceeds derived from the sale of any merchandise so sold and delivered to them under said contract should remain vested in said intervenors until the purchase price and value of the merchandise should be fully paid; that at divers dates between July 20th, 1904, and the 1st of May, 1905, the intervenors sold to said bankrupts under the terms of said contract merchandise to the amount of $15,369.57, that the bankrupts had paid upon said debt $2,059.01, leaving balance due $13,210.56; that on June 30th, 1905, E. M. Newton & Co., turned over on demand and delivered to the intervenors all the merchandise then remaining in their possession which had been sold under said contract,

invoicing $5,337.21, indorsed over notes of the face value of $1,684.32, and assigned and delivered accounts of the face value of $8,277.04, same being the notes and accounts received by said bankrupts as the proceeds derived by them from the sales, in the ordinary course of business, of merchandise sold and delivered to them under said contract; that on the 3rd day of July, 1905, said bankrupts filed their voluntary petition in bankruptcy, were adjudged bankrupts on said day and Thad A. Bryant was appointed receiver, and he demanded of said intervenors said goods and choses in action, claiming to be entitled thereto by virtue of his appointment, but the intervenors declined to deliver possession on the ground that they owned said property; that thereafter on the 4th day of July 1905, a written agreement was entered into by and between said intervenors and said receiver, said receiver acting under the direction and with the approval of the referee in bankruptcy, wherein it was stipulated that said property should be delivered to said receiver (see Exhibit "C" to the intervention, R. 176) upon the conditions expressed in a contract signed by said receiver, and that after said contract was so made the goods were delivered to said receiver.

The prayer was that the goods and choses in action, or the proceeds thereof, be returned to said intervenors (R. 168-172). For the contract of July 20th, 1904, between the intervenors, see R. 173; and the contract between the receiver and said intervenors of July 4th, 1905, see R. 176-7. By this latter contract it was agreed that the receiver should take possession of said property and convert the same to cash under the direction of the bankrupt court and that the assets should be kept separate and apart from the other proceeds of the bankrupts until all

questions regarding the title of possession of same should be "finally settled and determined by a court of competent jurisdiction, whereupon, if determined in favor of Swofford Bros. Dry Goods Co., said amount is to be forthwith turned over to said Swofford Bros. Dry Goods Co., free and discharged of all fees and charges and expense of whatever kind or nature, and that funds derived from said notes and accounts should be held intact as a separate fund and stand in lieu of said property."

In the preamble of said contract (R. 176) it was admitted that the notes and accounts were "proceeds of merchandise sold and delivered by said Swofford Bros. Dry Goods Co., to said bankrupts under and by virtue of the contract aforesaid" (of July 20th, 1904); and that said property was surrendered under the admission in the said agreement.

As a matter of fact the notes and accounts were not proceeds of sale of goods sold by Swofford Bros. Dry Goods Co., to said bankrupts, but they represented the goods sold from the general stock of Newton & Co., which consisted of merchandise bought from various creditors as well as from Swofford Bros. Dry Goods Co. No separate account was kept by Newton & Co. At the time this agreement was made by the receiver no creditor had filed a claim against the estate of said bankrupts, there was no trustee and no one represented the creditors (R. 200. See findings of fact 4 and 6).

The receiver and referee in making said erroneous admission whereby it is sought to take from creditors the notes and accounts, amounting to about $10,000.00, relied upon a statement attached to the petition in bankruptcy as schedule "A," where the intervenor's claim is referred to as a secured one and the notes and accounts

are referred to as being "from the goods of the said Swofford Bros. Dry Goods Co., purchase under said contract" (of July 20th, 1904, R. 3-4), but said statement relied upon by the receiver and referee was dictated by one of the attorneys for the intervenor and written by another of its attorneys (R. 108-9, 113-4).

The defense of the trustee to this intervention is in substance: That the goods surrendered to the receiver had not all been purchased from the intervenors under said contract of July 20th, 1904, and that the notes and accounts did not represent the resale of the goods which had been received from said intervenor, but that said notes and accounts were proceeds of sale of general stock of Newton & Company (R. 178).

That the trustee and referee had both been deceived by Swofford Bros. Dry Goods Co., in the admission made by the receiver in the contract of July 4th, 1905, and that said admission was not binding upon the creditors of the estate, that no creditor was at the time represented, no claims had been filed, and that the trustee who had the right to contest the claim of the plaintiff was subsequently appointed, and that it was beyond the power of the receiver or referee to make an agreement of any kind whereby the assets of the bankrupts would be given away (R. 181).

That the contract of July 20th, 1904, was a secret lien made between said intervenors and Newton & Co., to be used only in the event of the insolvency of said Newton & Co., that it was to be kept secret so that it would not injure the credit of said Newton & Co., was against public policy, and a fraud upon the Bankrupt Act; that it was understood that the goods sold by the intervenors to Newton & Co. should be placed in and mixed with the

general stock of said Newton & Co., and that the same should be sold in the regular course of business without keeping a separate account, or record, of the same, or accounting for the sale of said goods in any way, and that the effect of said contract was to give Newton & Co. a false credit based upon the apparent ownership of said goods, and that said contract was intended to give the intervenor a preference over other creditors (R. 186).

The Findings of Fact by the United States Circuit Court of Appeals.

It appears that the Honorable Circuit Court of Appeals included in its findings the following:

The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such marks as rendered them capable of being identified and separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. *The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.*

Newton & Company surrendered the goods, notes and accounts June 30th, 1905, and at that time they were insolvent, and Swofford Bros. Dry Goods Co. knew that they were insolvent;

That the goods surrendered *with slight exceptions* had been delivered under the contract, but only *about one-half* in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract;

That on July 3rd, 1905, three days after the surrender of the property, Newton & Co. filed their voluntary petition in bankruptcy, were adjudicated bankrupts and Thad A. Bryant was appointed receiver. In one of the schedules attached to the petition in bankruptcy Swofford Bros. Dry Goods Co. were listed as a secured creditor with a statement of facts upon which its rights were based and the recital of the surrender to it of the notes and accounts, that the notes and accounts were the proceeds of goods furnished by Swofford Bros. Dry Goods Co., under the contract;

That after the appointment of the receiver, Swofford Bros. Dry Goods Co. surrendered said goods, notes and accounts under the written stipulation hereinbefore mentioned, and that "no fraud or deception was practiced by Swofford Bros. Dry Goods Co. upon the referee or receiver in the making of this stipulation";

That the goods in controversy had sold for $3,135.00 and the trustee had collected $2,250.00 on the notes and accounts and still retained those uncollected (R. 198-201).

Conclusions of Law.

The contract of July 20th, 1904, is a contract of conditional sale and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

Under the laws of Arkansas the contract was valid as between the parties thereto, notwithstanding the fact that it authorizes the vendees to resell the goods delivered thereunder.

It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the

notes and accounts which represented proceeds of like goods resold by the vendee to their customers and which could be so identified and segregated.

The contract being valid under the local law as between the parties thereto, the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approval and without practice of fraud or deceit that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

Swofford Bros. Dry Goods Co., the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250.00, the collections of notes and accounts in controversy made by the trustee prior to the hearing before the referee, and also for such collections as may have been made since that time and for the surrender of such of said notes and accounts as remain uncollected and for costs. The sums mentioned should be paid in full (R. 201-202).

Assignment of Errors.

1. Error is assigned (see fourth assignment) because the Honorable Circuit Court of Appeals held that the trustee in bankruptcy is estopped from claiming the notes and

accounts in controversy (see fifth declaration of law, page 202) on account of the stipulation made between the receiver and Swofford Bros. Dry Goods Co., dated July 4th, 1905 (R. 176-7). Although the undisputed evidence shows that the notes and accounts did not represent wholly the proceeds of sales from goods purchased from Swofford Bros. Dry Goods Co., under the contract of July 20th, 1904. (See sixth finding of facts, R. 200.)

2. Error is also assigned because the Court found that under the laws of Arkansas the contract of July 20th, 1904, is valid; that the trustee had no greater right or title than the bankrupt; that said trustee is estopped from disputing the statement contained in the stipulation between the receiver and intervenor; and that the Court erred in each of the declarations of law hereinbefore copied.

Argument.

Two questions are presented in this appeal:

FIRST, did the receiver with the assent of the referee have authority to make the admission, so that it might not be questioned by the trustee, contained in the agreement of July 4th, 1905 (R. 176-7), that the notes and accounts turned over to the intervenor were proceeds of sales of goods purchased from Swofford Bros. Dry Goods Co., and

SECOND, was the contract, dated July 20th, 1904, entered into between E. M. Newton & Company, and Swofford Bros. Dry Goods Company, valid in view of the fact that it was not pursued or observed by either party from the time of its execution until June 30th, 1905, just before the voluntary petition in bankruptcy was filed.

I.

Under section 2 of the Bankrupt Act it is provided that the courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, (3) to appoint receivers, or the marshals, upon application from parties in interest, in case the court shall find it *absolutely necessary for the preservation of the estate* to take charge of the property of bankrupts after the petition in bankruptcy has been filed and until it is dismissed, or the trustee is qualified; (5) to authorize the business of the bankrupts to be conducted for a limited period by receiver, the marshals, or trustees, if necessary, in the best interest of the estates.

The petition in bankruptcy in this case was voluntary, and the judge being absent from the district, under section 18-g, the case was referred to the referee. By section 38-a the referees are invested, *subject always to a review by the judge,* with certain powers, among which is "he may exercise the power of the judge for taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness, or inability to act.

In this case after the petition was referred to the referee by the clerk, July 3rd, 1905, on the same day he appointed Thad A. Bryant receiver, and he demanded of Swofford Bros. Dry Goods Co. the possession of the goods, notes and accounts which had been turned over to it, three days before the petition in bankruptcy was filed, and negotiations began between the receiver and

the said company which resulted in a stipulation whereby it was agreed that the receiver should take possession of said property, collect the notes and accounts and sell the goods and that the proceeds should be held in lieu of the property so surrendered, to abide the final determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company should prevail it should have the proceeds free of fees, charges and expenses, and it was further stipulated that the notes and accounts so surrendered were proceeds of goods which had been sold by Swofford Bros. Dry Goods Co., to Newton & Co., under its contract of July 20th, 1904.

The findings of the Court of Appeals are in line with the uncontradicted proof that no separate accounts were kept by Newton & Company of the goods purchased under said contract and that the notes and accounts turned over represented sales of the general stock in which the goods of Swofford Bros. Dry Goods Co. were mixed with the goods of like kind purchased from other creditors.

The stipulation making the admission was approved by the referee who relied upon a statment filed by the bankrupt, attached to the petition in bankruptcy.

No creditor was represented in these negotiations inasmuch as creditors at that time had not been notified of the filing of the voluntary petition.

It is our contention that the power of the receiver and of the referee are derived solely from the Bankrupt Act, and there is nothing in the Bankrupt Act which will authorize a receiver to enter into an agreed statement of facts pertaining to the case. Such action on the part of the receiver would seriously hamper the power and authority of the trustee in the administration of the estate.

Furthermore, it does not appear that there was any consideration for that part of the agreement. It would seem to be enough for the receiver, in taking charge of the property, to assume the responsibility of taking care of it and reducing it to cash, and turning it over to Swofford Bros. Dry Goods Co., in the event its intervention should be sustained, without going so far as to preclude creditors, when they should become parties to the proceedings, from inquiring into the merits of the case.

Under the decision of the Honorable Circuit Court of Appeals the action of the trustee in this case amounted to the surrender and giving away of notes and accounts aggregating about $10,000.00.

As soon as the trustee in bankruptcy was elected and the intervention of Swofford Bros. Dry Goods Co. was filed an investigation was made by the creditors through the trustee and it was discovered that Swofford Bros. Dry Goods Co. had no more claim on the notes and accounts than any other creditor, and it was so found by the master who heard the case. The District Court denied the intervention as to all the property claimed, but the Honorable Circuit Court of Appeals sustained the intervention, not only as to the goods, but as to the notes and accounts, holding that the stipulation of the receiver was binding on the estate. It is true that the same person who acted as receiver was appointed trustee, but it cannot be seen why this will alter the case. In each capacity his authority was prescribed and limited by statute.

In the opinion of the Honorable Circuit Court of Appeals it appears that the trustee cannot be heard to dispute the correctness of the stipulation so long as he holds possession as trustee of the notes and accounts. No opportunity has yet been given to the trustee to surrender

the possession, if a surrender is necessary, before this case may be heard upon its merits; but judgment was rendered in favor of the intervenor apparently on the ground that the trustee could not foresee that the decision of the District Court would be reversed. It seems, at least, that it would have been only fair to give the trustee an opportunity to hold the goods and lose the case, or surrender the goods with the right to test its merits in a court of competent jurisdiction.

While the receiver undoubtedly had the right and it was his duty to take charge of the bankrupt estate, we deny that he had authority, under the statute creating his office, to enter into any kind of an agreement which would in any manner affect, or give over to, a claimant the property of the bankrupt estate. The trustee is primarily the representative of the creditors and not the receiver. The receiver is non-partisan and he acts as an agent for the court in protecting the property against loss.

But the trustee is appointed to represent creditors.

By section 26 of the Bankrupt Act the trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate, and by section 27 he may compromise any controversy arising in the administration of an estate upon such terms as may be of the best interest for the estate.

But under General Order No. 33 (of the United States Supreme Court) a trustee is not authorized to have a controversy arbitrated without first filing a petition setting forth the facts.

Nor is a referee authorized to approve a compromise of any controversy without first giving ten days' notice to creditors as required by section 58 of the Bankrupt

Act. So, it would appear that even after creditors have become parties to the bankruptcy proceeding they are entitled to notice before a controversy involving their rights can be settled. In other words, the creditors are entitled to be heard.

Therefore the reason would appear much stronger why it should be held that the receiver has no authority, express or implied, to give away or surrender the rights of creditors, or agree that certain evidence may not be introduced in the trial of any controversy that might arise in the administration of the estate. In this case the proceedings between the trustee and intervenor seem to have been practically *ex parte*. The creditors were not yet parties to the proceedings and no one represented them, and as the intervenor had taken over the notes and accounts, it is quite evident that it must have known whether or not they were notes and accounts arising from the sales of Newton & Company's general stock of merchandise.

The referee and receiver were not in position to know.

When this case was heard before the Honorable District Court upon the exceptions of both parties to the report of the Master, the Court held that the intervention should be denied on the ground that the contract of July 20th, 1904, in view of the conduct of the parties to it, was a mortgage or secret lien which was a fraudulent conveyance and fraudulent preference under the Bankrupt Law, and that the trustee took title to the property under the Bankrupt Act. The Court did not pass upon the validity of the stipulation made between receiver and intervenor. But inasmuch as that officer, as well as the trustee, are officers of the Court, if said stipulation had been considered and had been found a barrier to granting relief to the trustee without first surrendering the goods

back to the intervenor, the Court would certainly have directed the trustee to do so in order that the rights of unsecured creditors might not be unduly sacrificed; and then the trustee could have brought suit against the intervenor and under the undisputed evidence would have been entitled to recover the notes and accounts in any court of competent jurisdiction.

The claim of the intervenor that it gave up a valuable privilege in making the voluntary surrender of the goods, notes and accounts in consideration of the stipulation of the receiver making the false admission, is rather imaginary, because a suit would have undoubtedly been successful under the undisputed facts (as found by the Circuit Court of Appeals) by a trustee of the bankrupt estate in any court of competent jurisdiction. But if it be true that the trustee should place the intervenor in *statu quo,* then certainly there can be no reason why the trustee should not be permitted to do so. The District Court undoubtedly would and should have done so if it had taken the same view as the Circuit Court of Appeals. Then why would it not have been more just for the Honorable Circuit Court of Appeals to have rendered a judgment placing the intervenor in possession of the disputed property, but reserving to the trustee the right to sue for it in another proceeding?

After the trustee was elected, as already shown, the creditors caused him to make a defense to the intervention of Swofford Bros. Dry Goods Co.

This the creditors had a right to do under number 21, section 6 of general orders in bankruptcy, either in the name of any creditor or in the name of the trustee, but they elected to make this contest through the trustee.

It was decided in the case of Chatfied *et al. vs.*

O'Dwyer, Circuit Court of Appeals, Eighth Circuit, 101 Fed. Rep., 799, that the trustee is the proper party to act for the creditors in appeals from the decision of the District Court, and that an appeal cannot be taken by an objecting creditor.

In the case of Booth *vs.* Clark, 17th Howard, 322, it appeared that a receiver was appointed by one of the Chancery Courts of New York, under a creditor's bill against Clark. Subsequently, he went into another State and took the benefit of the Bankrupt Law. Clark afterwards was awarded a sum of money for a claim arising anterior to either of the above proceedings and the contest arose in the Circuit Court of the United States for the District of Columbia between the receiver and the assignee in bankruptcy. The case reached the Supreme Court of the United States, where it was held that the title of the assignee in bankruptcy, although the receiver had been appointed by the State Court some time before the proceedings in bankruptcy began, was superior to the claim of the receiver; that a receiver is an officer of the Court which appoints him, but he cannot sue in a foreign jurisdiction for the property of the debtor. It was said by the Court in that case (page 331):

> "A receiver is an indifferent person between parties, appointed by the Court to receive the thing in question; where it does not seem reasonable to the Court that either party should do it; he is an officer of the Court; his appointment is provisional; he is appointed in behalf of all parties and not of the complainant or defendant only; he is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. It is the Court itself which has the care of the property in dispute. The re-

ceiver is but the creature of the Court; he has no powers, except such as are conferred upon him by the order of his appointment and the practice of the Court."

But by section 70 of the Bankrupt Act the title of the bankrupt's property is vested in the trustee. If the title of Newton & Company to these notes, accounts and goods, to which the intervenor could not make claim, vested in the trustee, then it would seem that the receiver would be without power to make any contract whereby that title could be divested. In this case the stipulation, however, has been sustained by the Honorable Circuit Court of Appeals, and the direct effect of it was to divest the title of property from the trustee which it was intended by the Bankrupt Act should pass to him.

But the trustee has not in himself the right of unlimited disposition of the property of the bankrupt. He cannot compromise or arbitrate a controversy, except in a certain way prescribed by the statute and by the general orders in bankruptcy. Certain the receiver, who has not as much power as the trustee, should not, therefore, be allowed to make contracts or deals without any restriction whatever, whereby the property which belongs to the creditors would be wasted or given away.

In the case of Wallace *vs.* Loomis, 97 U. S., 146, it was held that an assignee in bankruptcy represented all creditors of every class, and the latter were bound by all legal proceedings carried on by him affecting his trust. .

In the case of Dudley *vs.* Easton, 104 U. S., 99, it was held that the assignee in bankruptcy represented the general or unsecured creditors; he is in no respect the agent or representative of secured creditors, who do not prove their claims.

In the case of Ray *vs.* Norsworthy, 23 Wallace, 128, it appeared that the assignee in bankruptcy attempted to sell some of the property in his hands free of liens, but no notice was given to the secured creditors whose rights were affected by the sale. The Court, in holding that the action of the Bankrupt Court, in authorizing the assignee to make the sale was invalid, said:

> "Concede to the fullest extent the powers of the Bankrupt Court to do everything specified in the Bankrupt Act, still it is clear that the mortgage and privilege of the petitioner could not be cancelled and displaced without notice nor without an opportunity to be heard, nor could the proceeds of the sale be adjudged to a junior mortgagee with or without notice, unless for some cause other than what is disclosed in the record. Peychaud *vs.* Bk., 21 La. Ann., 262. Notice in some form must be given in all cases, else the judgment, order or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding. Wilson *vs.* Bell (The Lottawanna), 20 Wall., 201 (87 U. S. XXII., 259); Nations *vs.* Johnson, 24 How., 205 (65 U. S. XVI., 632); Harris *vs.* Hardeman, 14 How., 339; Borden *vs.* Fitch, 15 Johns, 141; Buchanan *vs.* Rucker, 9 East, 192.
>
> "No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded. Every person, as this Court said in the case of The Mary, 9 Cranch, 144, may make himself a party to an admiralty proceeding and appeal from the sentence, but notice of the controversy is necessary in order to enable him to become a party. Web-

ster *vs.* Reid, 11 How., 460; Boswell *vs.* Otis, 9 How., 350; Oakley *vs.* Aspinwall, 4 N. Y., 515.

"Authorities to the same effect are very numerous, nor is there any well considered case which gives any support to the proposition that the judgment order, sentence or decree of a court disposing of property subject to conflicting claims will affect the rights of anyone not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding. Weed *vs.* Weed, 25 Conn., 337; Means *vs.* Means, 42 Ill., 50; Hill *vs.* Hoover, 5 Wis., 386; Wallis *vs.* Thomas, 7th Ves., 292; Rockland Water Company *vs.* Pillsbury, 60 Me., 427; Lane *vs.* Wheless, 46 Miss., 666; Hetrick *vs.* Wilson, 12 O. St., 136; Vallejo *vs.* Green, 16 Cal., 160."

In the case of White *vs.* Schloerb, 178 U. S., 542, it is said that the referee in bankruptcy exercises much of the judicial authority of the Court of Bankruptcy.

Notwithstanding the referee has in certain matters the authority of a Court, still as the trustee is the representative of creditors their rights cannot be affected until the trustee is appointed. The proceedings filed prior to the appointment of a trustee, are only preliminary, for the purpose of taking charge of bankrupt's estate where it is absolutely necessary for its preservation, and then creditors are invited in for the purpose of appointing a trustee, settling disputes and distributing the property.

By section 38-a of the Bankrupt Act the referee is invested with some of the powers of the Court of Bankruptcy, but his decisions are always subject to review by the judge.

In this case as soon as the intervention was filed an answer was made by the creditors through the trustee

(see R. 181) raising the questions under discussion, and the intervention was denied by the Honorable District Court in toto, but on appeal a final judgment was rendered by the Circuit Court of Appeals, not only giving to the intervenor the merchandise which the Court found had been sold under the contract of July 20th, 1904, with slight exceptions (see finding 6, R. 200), but the notes and accounts to which it had no claim, on the ground of the action receiver had estopped the trustee to claim title.

We respectfully submit that the acts of the receiver, approved by the referee in the stipulation referred to, was without authority, express or implied, by the Bankrupt Act.

But if it should be held that the act of the receiver estops the creditors and trustee from recovering that part of the assets, the title of which is in the trustee, without first surrendering the property involved to the intervenor, the trustee prays for a reversal of the judgment of the Circuit Court of Appeals decreeing all said property to the intervenor and that such judgment be rendered as will give the trustee the right to turn over said property without prejudice to a suit which may be instituted by him for the recovery thereof or its value in another suit.

II.

We respectfully insist that the judgment of the Honorable District Court of the United States for the Western District of Arkansas, Texarkana Division, was correct in holding that the contract of July 20, 1904, was a mortgage or secret lien which was fraudulent as to creditors of Newton & Co.

It will be remembered that the merchandise was shipped from time to time between the execution of the contract of July 20, 1904, to June 30, 1905 (see statement of account, R. 136-7), and at no time were Newton & Co. required to account or remit for the sales of the goods so shipped, but said goods were mixed with goods of like character purchased from other creditors and no separate accounts were kept and it was difficult to ascertain positively from the conflicting evidence (R. 56) whether the goods which were turned over June 30, 1905, had been bought from Swofford Brothers. The finding of the Circuit Court of Appeals (see finding No. 6, R. 200) was that the goods surrendered were, *with slight exception,* goods that had been delivered under the contract. The intervenor ought not to recover if there be any doubt as to the identity of the goods or any part thereof.

The conduct of the parties was such as to lead any one to believe that it was not the purpose of Swofford Brothers to fall back upon the contract unless Newton & Co. should become insolvent. It appears from the testimony that Newton & Co. had been buying goods from Swofford Brothers for several years, and at the time this contract was made, they owed said company $5,000 (R. 33). And this debt was paid from the proceeds of the general stock before any payments were ever applied toward the goods which were shipped under the contract of July 20, 1904.

It would be impossible to say how much of the goods still remained on hand at the time of the transfer which had been bought of Swofford Brothers prior to said contract.

In the case of Herryford *vs.* Davis, 12 Otto, 235, it was held that:

> "A contract between a manufacturer of cars and a railroad company, by which the latter was bound to pay the price of certain cars delivered to it by the former, either by paying its notes or surrendering the property to be sold in order to make payment, is not a conditional sale, but a mortgage."

In that case Mr. Justice Strong, speaking for the Court, said:

> The plain purpose of this statute was to render secret liens upon personal property ineffectual as against purchasers or creditors. The property in this case was in the possession of the railroad company when the levy upon it was made, and the contract under which the company held it was not recorded.
>
> What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is sought for. The form of the instrument is of little account.

One of the reasons assigned by the Circuit Court of Appeals for reversing the judgment of the District Court is that said contract of July 20, 1904, was valid under the laws of the State of Arkansas as against the trustee in bankruptcy of Newton & Co. It will be seen that

Newton & Co. were permitted to treat the goods as their own and use them as they saw fit and were not required to make reports of sales.

If Newton & Co. had not become insolvent, this course of dealing would have continued without interruption indefinitely, but as soon as they became insolvent, then the contract which had been kept secret was brought into requisition. While the contract itself in terms reserved title to the proceeds of sales, the finding of the Court of Appeals shows that the contract was not lived up to by either party (see finding 4, R. 200). "The Newtons did not keep separate accounts of their resales of goods, nor did the Dry Goods Company require them to make reports thereof."

There are a number of decisions of the Supreme Court of Arkansas sustaining contracts wherein it is stipulated that the title of the property is to remain in the vendor until the price is paid, but these decisions are with reference to such things as machinery, farming implements, live stock, and where it is not agreed that the property shall be resold.

Gibson *vs.* Martin, 38 Ark., 207;
McIntosh & Beam *vs.* Hill, 47 Ark.,363;
Carroll *vs.* Wiggins, 30 Ark., 402;
Simpson *vs.* Shackerford, 49 Ark., 63;
McRea *vs.* Merrifield, 48 Ark., 160;
Cincinnati Safe Co. *vs.* Kelly, 54 Ark., 476;
Edgewood Distilling Co. *vs.* Shannon, 60 Ark., 133;
Dedman *vs.* Earle, 52 Ark., 164;
Ferguson *vs.* Hetherington, 39 Ark., 438;
Ames Iron Works *vs.* Rea, 56 Ark., 450;
Morris *vs.* Cohn, 55 Ark., 401;
Bank of Little Rock *vs.* Collins, 66 Ark., 240;
Faisst *vs.* Waldo, 57 Ark., 270.

The doctrine of these cases follow the decisions of the Supreme Court of the United States:

Sturm *vs.* Boker, 150 U. S., 312.

There is an obvious difference in reserving the title to implements, wagons, grist-mills, tools, etc., under such contracts, and gents' furnishing goods or general merchandise, where there can be no question of the identity of the wagons, machinery, etc., but there would always be a question with reference to the identity of general merchandise. The very nature of the goods themselves, added to the power of disposition as in the case at bar, without being required to keep them separate from other goods or the proceeds separate from the general stock, ought to bar a recovery in this case.

This difference is recognized by the Supreme Court of Arkansas:

Lund *vs.* Fletcher, 39 Ark., 334.

The case of Robinson *vs.* Elliott, 22 Wall., 513 (89 U. S.).

In that case a mortgage was given on a store of goods and it was duly recorded.

But there was a provision in the mortgage authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade and to use the money thus obtained to replenish his stock. It was held as a matter of law that the instrument was fraudulent as to the assignee in bankruptcy.

The Court, in passing upon the validity of this mortgage, says:

> "But there are features engrafted on this mortgage which are not only to the prejudice of cred-

itors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that debt would be paid at maturity, but that it would be renewed from time to time, as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry goods merchants, from July 7th, 1871, to August 7th, 1873. During this period of twenty-five months Robinson indorsed as usual, and Mrs. Sloan was content with the payment of a small portion of the principal of her debt. Instead of getting it renewed, as contemplated by the mortgage, she seems to have been willing to let it remain dishonored, and the fair inference from the averments of the bill is that Robinson would have continued to indorse, and Mrs. Sloan exhibit the same easy indifference on the subject of her indebtedness, if the death of Seth Coolidge

had not dissolved the firm and compelled an inventory and appraisement, showing the desperate condition of the mortgagors. It hardly need be said that a mortgage, which by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent.

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit for what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

"In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

"Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to

ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common law doctrine, and are sustained by a number of American decisions. In the American editor's note to Twyne's case, Smith, L. Cas., p. 52-n., 7th Am. ed., most of the cases in this country on the subject are collected and classified. See, also, Mittnacht *vs.* Kelly, 3 Keyes, 407; Yates *vs.* Olmstead, 65 Barb., 43; Barnet *vs.* Fergus, 51 Ill., 352; *In re* Manly, 2 Bond, 261; *In re* Kahley, 2 Biss., 383.

"It is contended by the appellants that the rulings of the *Indiana courts are in favor of the validity of this mcrtgage,* and the main case relied upon to support this position is Maple *vs.* Burnside, reported in 22 Ind., 139. The facts of this case are stated in the opinion of the Court in a way to render it difficult for any practitioner outside of the State to understand the application to them of the legal rules which are discussed; *but there is nothing to show that the mortgage there considered contained any provision permitting the mortgagor to remain in possession of the property and deal with it as his own,* nor does the judgment of the Court involve any such question. The case would seem to be chiefly valuable as an authoritative exposition of certain points of *nisi prius* practice. Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the Ins. Co. *vs.* Wilcoxson, 21 Ind., 355, would seem to imply that when such case did arise it would be decided in accordance with the views we have presented."

Is there any reason why the same principle should not apply to the same conditions, in the case at bar, although

the instrument was not acknowledged or recorded?

There are numerous decisions cited in the footnote to this case in L. C. P. Co., edition, Book 20, showing that a "chattel mortgage which by its condition permits the mortgagee to remain in possession of the property and to deal with it as his own, disposing of it by sale in the due course of trade is fraudulent in law as to the creditors of the person making the sale and as to subsequent purchasers, and is absolutely null and void as to them without reference to the *bona fides* of the mortgage debt or the intention of the mortgagor as to fraud if the power of *disposition does not appear upon the face of the mortgage, but it is so understood or agreed by the parties at the time the mortgage is executed it is equally void.*

See among other numerous authorities Lund *vs.* Fletcher, 39 Ark., 325.

The case of Means *vs.* Dowd, 128 U. S., 273, is where the same principle is applied to a general assignment for the benefit of creditors. The decision of Robinson *vs.* Elliott, *supra,* is quoted from at length.

In that case certain debtors made a general assignment of their property, but the instrument permitted the assignor to remain in the possession of the property and to continue to sell the goods and collect the debts, and collections to be used to replenish the stock, and also provided for a renewal of the debt. It was held that the instrument was fraudulent and void and that if the legal effect of the instrument be to delay creditors it is void. The Court also quoted with approval from the case of Griswold *vs.* Sheldon, 4 N. Y., 481, in which the Court decided that a mortgage which, besides permitting the mortgagor by its terms, to retain possession of the goods and conferred on him the power to sell and dispose of

the same by orders was fraudulent and void in law as to creditors. Also quoted with approval from the case of David *vs.* Ramson, 18 Ill., 396, wherein it was held that a mortgage was void upon the principles already mentioned, which permitted the mortgagor to keep possession of the goods and sell them in the usual course of trade.

In the case at bar the contract relied upon authorized Newton & Co. to sell the goods in the usual course of trade and the proceeds of sales were applied by Newton & Co. as they saw fit, and they did not account to Swofford Brothers for the sales. It may be remarked here that it was shown by the testimony on the part of the intervenor that at the time this contract was made Newton & Co. owed Swofford Brothers on goods sold previous to July 20, 1904, about $5,000, and that this amount was paid from the general stock of Newton & Co., between the date of July 20, 1904, and June 30, 1905 (R. 36, 98).

In the case of Blennerhassett *vs.* Sherman, Assignee, 105 U. S., 100, the Court said:

> "As long ago as the case of Hungerford *vs.* Earle, 2 Vern., 261, it was held that 'A deed not at first fraudulent may afterwards become so by being concealed or not pursued by which means creditors are drawn into lend their money.' This doctrine has been repeatedly reaffirmed. Chancellor Kent in Hildreth *vs.* Sands, 2 Johns. Ch., 35; Scivenor *vs.* Scivenor, 7 B. Mon., 374; Bank *vs.* Housman, 6 Page, 526.
>
> "In Coates *vs.* Gerlach, 44 Pa., 43, a deed of land had been made, directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, 1857. On January 21, 1858, the husband, professing to

act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase money in the hands of the vendees, and between them and the wife a contest arose on the question which had the better right to the proceeds of the sale. Touching this controversy, Mr. Justice Strong, delivering the opinion of the Court, said: 'There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband false credit, and equity will not aid her at the expense of those who have been misled by her laches.'

"So in Hilliard *vs.* Cagle, 46 Miss., 309, it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may, nevertheless, be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde,* showing the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The Court declared that 'The natural and logical effect of the agreement and assignment, and the

conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object.

"In the case of Gill *vs.* Griffith, 2 Md. Ch., 270, the Court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in this case was, therefore, declared void. Upon appeal, the Court of Appeals affirmed the decree for the reasons assigned by the Chancellor."

See also Second Nat'l Bank Leavenworth *vs.* Hunt, 11 Wallace, 391.

Trustee Acquired Title to Property in Controversy Under Section 70-A of the Bankrupt Act.

The case of Hewitt *vs.* Berlin Machine Works, 194 U.S., 296, is cited to sustain the opinion of the lower Court. In that case it appeared that the Berlin Machine Works sold certain machines to Kellogg on credit and reserved title to the property until they were paid for. Several months thereafter Kellogg was adjudicated a bankrupt

and the purchase price of the machines not having been paid, the machine company filed an intervention claiming the machines, and it was held that the sale was conditional. The machines were not sold to the purchaser with the expectation that they would be resold or that the purchaser would appropriate the proceeds to his own use.

As to the case of Thompson *vs.* Fairbanks, 196 U. S., 516, see the following quotation from Mr. Justice Peckham:

> "There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as prior to the title of the trustee for the benefit of the creditors, it must be because of some provision of the bankruptcy law, which we think the Court ought not to construe or endeavor to enforce beyond its fair meaning."

The case of York Manufacturing Co. *vs.* Arthur Cassell, 201 U. S., 344, is not in point. In that case, the

York Manufacturing Co. supplied machinery to the M Vernon Ice, Coal and Milling Co., under contract stipulating that the title to the machinery, apparatus or plant should remain in the York Manufacturing Co. until the purchase price was paid, which contract was not recorded as required by the laws of the State of Ohio, and the contract was sustained. It was not understood that the vendee should sell the property or that it should apply the proceeds thereof to its own use.

But the case at bar bears no resemblance on its face to the above cited cases.

It is more like the case of Security Warehousing Co. *vs.* Hand, 206 U. S., 415, in which Mr. Justice Peckham, speaking for the Court, said:

> "By section 70-a, the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and by subdivision (e) of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.
>
> "The method taken to store the property was, as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control, and such scheme, under the facts, and as carried out in this case, and with

> regard to the Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors."

In the case of Dudley *vs.* Easton, 104 U. S., 99, it was held that:

> "As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, the assignee takes as a purchaser from the bankrupt with notice of all outstanding rights and equities."

If the transactions developed in this case are so unfair to other creditors as to amount to fraud upon their rights, then the trustee takes the title to the property in controversy.

We therefore respectfully insist that the Circuit Court of Appeals erred in its 4th declaration of law (R. 201) that the trustee had no greater right or title than the bankrupts.

Arkansas Decisions.

The decisions of the Supreme Court of Arkansas, under practically the same conditions as in the case at bar, show that the intervenors' contract is fraudulent in law and cannot be sustained.

In the case of Lund *vs.* Fletcher, 39 Ark., 335, it was said:

> "A majority of this Court approve the views of this question expressed by Chancellor Cooper, of Tennessee, in the case of Phelps *vs.* Murray, 2 Tenn. Ch., 746, considering them based on good reason and sound policy. And the Court concurs in adopting them for the decision of this case, and

> to settle the question in this State, for all cases presenting the same aspect. That eminent jurist, whose ability, judicial temperament and profound study entitle his opinions to the highest consideration, whilst conceding that a mortgage may be made to cover after-acquired property, and that there may be left in the mortgagor a limited power of disposition over specific articles, with a view to their replacement, such as tools, machinery, rolling stock, etc., denies that such power of disposition consists with a valid lien on personal goods, which can only be profitably used as articles of commerce. He says that such a fluctuating lien, opening to release what is sold, and to take in what may be purchased, is invalid in law, and not enforcible in equity."

In the case of Martin *vs.* Ogden, 41 Ark., 192, the Court held:

> "It was neither alleged nor proved to have been made with base motives, but may be held fraudulent if the facts justify the conclusion. It has many of the indications of fraud by presumption which existed in the well known Twynne's case. That presumption may grow, not alone from the face of the instrument, but from concurrent acts, surrounding circumstances and subsequent conduct of the parties to the instrument, reflecting light upon their original intention. The more modern and better doctrine is that this is a presumption of fact, and that no conclusive legal presumption arises from the fact that the vendor remained in possession, and that even such a presumption of fact does not necessarily arise where the possession accompanies or follows the deed, or where there is a mere mortgage. It is a question for the jury, or, in equity, for the chancellor, under all the circumstances.

"If the mortgage had been merely of articles, beneficial in the use, such as tools, agricultural implements, railroad equipments, horses, mules, etc., then it would be natural and proper that the owner should remain in possession and have that use, not only for his own convenience, but the better to enable him to pay the debt; and future acquisitions of such property may be brought within the mortgage, and provisions for their change and replacement as necessity or convenience may require, may be properly made.

"But drugs in stock are kept solely for merchandise, and have no other use than for sale, and disappear on selling. The parties would not have been allowed to provide that the mortgagor might remain in possession and dispose of drugs in the course of trade, without applying the proceeds to the debt, or in some way attaching them or their fruit, a continuing trust, and at the same time make continual additions to the stock, all to be protected by the mortgage against creditors. It is evident that one might continue business all his life that way, secretly investing all surplus profits for the benefit of himself and family, and always keeping enough stock to satisfy the demands of his trade with perfect impunity—that is, if his mortgagee were allowed thus to protect and shield him. It is no answer to say that by this course the mortgagee's security is diminished also. That would be his own business if true, but he would have no right at his own risk to enable his debtor to defraud everybody else. That would violate the maxim of *'sic utere tuo,'* etc. Besides it would be an easy matter to keep always in sight enough to satisfy the mortgage and not enough more to tempt other creditors to grasp after the surplus. According to ordinary human motives, a creditor thus favoring a debtor, might rely upon his complaisance to that extent.

> "Why should parties be allowed to do with impunity the very things which the law tells them they shall not agree to do? Yet it seems to us, that the able counsel for appellants are urging upon us that they must be; because, as they say, the mortgage contains no such stipulations and is not void upon its face, and that matters are not necessarily fraudulent when done, which the law would have held fraudulent in them to stipulate to do."

In the case of Fink *vs.* Ehrman Bros., 44 Ark., 310, it was held that a mortgage on merchandise was valid on its face but when the mortgagor retained possession, sales continued, and the stock replenished as before the mortgage, this is evidence of fraud against attaching creditors and conclusive if not explained.

> "Where there is an agreement or understanding between the mortgagor and mortgagee of a stock of goods that the mortgagor may remain in possession of the goods and sell them as his own, the mortgage is as fradulent and void as to other creditors as if the agreement were expressed in the mortgage; and to arrive at their true meaning, the concurrent acts, surrounding circumstances, and subsequent conduct of the parties are taken together for the consideration of the Court or jury trying the issue."

Case of Triplett vs. Mansur & Tebbets Implement Co., 68 Ark., 230.

The decision in this case was relied upon by the Circuit Court of Appeals as the basis for holding that the contract between the intervenor and the bankrupt under the laws of Arkansas is valid.

But we respectfully insist that said case has no application whatever to this controversy.

It appears from the facts in that case that Mansur & Tebbets Implement Co., of St. Louis, sold to H. C. McGaughy, of Pine Bluff, certain hardware, machinery, etc., under a contract in which it was stipulated that the title to and ownership of all goods which might be shipped during said season should remain in and their proceeds in case of sale should be the property of Mansur & Tebbets Implement Co. until full payment should be made therefor, and as shown on page 234 of the report, if the goods were sold by McGaughy, they were to be sold as the property of Mansur & Tebbets Implement Co. and the proceeds of sale were to be and remain the property of said company.

There was no question whatever as to whether or not creditors had been misled to their prejudice. If not distinctly shown, the inference is clear that McGaughy was to act as the agent for the implement company in making the sales and that he accounted for the proceeds of said sales. There is not the slightest reason to believe from the report of this case that the implements, machinery, etc., sold to McGaughy were mixed with implements, machinery, etc., of like kind bought from other creditors or that McGaughy failed to keep a separate account of sales of said implements, or remit for the same as required by his contract.

The case at bar distinctly presents the opposite state of facts; that is to say, the goods in question were mixed with those bought from other creditors, no separate account was kept of the goods or the proceeds, nor were Newton & Co. expected or required to account for the proceeds of sale. On the contrary, the proceeds of the

general stock, including the Swofford Brothers' goods, were used by Newton & Co. as they saw fit. As already shown, Swofford Brothers succeeded in collecting an old debt of $5,000 on account of general sales from the general stock.

Again the Circuit Court of Appeals contrasted the assignee under a general assignment for the benefit of creditors with the trustee in bankruptcy. There is no more similarity between the rights and powers of said assignee and the trustee than there is between the facts in the case at bar and the one under consideration.

The title of an assignee under a general assignment for the benefit of creditors under the laws of Arkansas fails whenever it is shown that there is fraud on the part of the assignor in making the assignment.

Section 338 of Kirby's Digest of the Statutes of Arkansas reads as follows:

> Any assignment for the benefit of creditors may be contested or attacked for fraud, by any creditor, and proof of fraud on part of the assignor shall be sufficient to invalidate the assignment, whether the assignee knew of it or not.

The following decisions also show that he has no title whatever that will be respected by the courts in case there is fraud in the deed of assignment:

Hill *vs.* Shrygley, 51 Ark., 59;
Probst & Hill *vs.* Welden, 46 Ark., 405;
Penzel Grocer Co. *vs.* Williams, 53 Ark., 81;
Lazarus *vs.* Camden National Bank, 64 Ark., 322.

On the other hand, under the bankrupt act the title of the trustee is made effectual to property which has been fraudulently transferred by the bankrupt.

The precise question involved in this case under exactly the same form of contract has not been presented to the Supreme Court of Arkansas. But the principles applicable thereto seem to be clearly established by the foregoing decisions.

Loving Pub. Co. *vs.* Johnson (Tex.), 4 S. W., 532, involved almost identically the same questions as in the case at bar. Willie, C. J., in passing upon the validity of such contracts, said:

> "The decision of the District Judge in this case is sought to be sustained upon the principles announced in Bank *vs.* Tufts, 63 Tex., 113; but the two cases are unlike each other in many important particulars. There the contract was made in reference to a specific article, and no power of sale was given to the vendee. Here the agreement was made in reference to a stock of goods consisting of a multitude of different articles, and they are to be sold in the usual course of trade. Not only so, but these goods are allowed to be replaced by others to be sold and others purchased, till there may not remain the smallest remnant of the original stock; and yet through all these mutations, the stock is to be protected against the creditors of the vendee. This arrangement, too, is secret; no record made of it, and no knowledge of its existence brought to the world. A better device for the perpetration of fraud upon the creditors of the vendee could hardly be invented. They are placed in a position where they can enjoy all the benefits of a merchant without being subject to any of the usual liabilities which may arise in the course of trade. They hold themselves out to the world as the owners of the goods, with every outward appearance of ownership, and may thereby obtain false credit. (Hilliard *vs.* Cagle,

46 Miss., 309.) They can sell the property as they see fit, devote a large portion of the proceeds to their own benefit, and set their creditors at defiance. They can hinder and delay these as long as they please and their confidential vendors may deem proper."

Decisions of the State of Tennessee.

As shown by the opinion in the case of Lund *vs.* Fletcher, 39 Ark., 334, the decision in the case of Phelps *vs.* Murray, 2 Tenn. Ch., 746, was adopted by the Arkansas Supreme Court in holding that a mortgage is fraudulent as to creditors where the mortgagor is given the power of disposition of personal goods which can only be profitably used as articles of commerce. Hence the following decisions of the Supreme Court of Tennessee which are in harmony with those of the Supreme Court of Arkansas may be profitably consulted:

In the case of Mayor *vs.* Catron, 48 S. W., 255, it appeared that:

> "A wholesaler at various times shipped goods to a retailer, the bills being marked 'Consigned; our property until paid for.' He knew that the latter mingled the goods with his regular stock and retailed them to customers. He placed no restrictions upon such sales, and required no reports of sales, and no account of sales was kept, but part of the goods were paid for out of the general proceeds."

The Court held that this contract was void as to the creditors of the vendee.

The Court fully recognized that it was the law of Tennessee that a party could make a valid contract for the

sale of personal property, under which the possession would pass to the purchaser and the title remain in the seller until the purchase money was paid, which is in line with the Arkansas decisions.

But the Court held that it was equally well settled that where a purchaser is put in possession of personalty by the owner and at the same time clothed with all the *indicia* of title and ownership, and is expected to sell the property, his vendee will get a good title.

See Wilder *vs.* Wilson, 16 La., 548.

The Court further continuing, said:

> "In the case at bar it is manifest that the complainant sold the goods to Collier & Fawkes, and later to Fawkes, with the intention, expectation and knowledge that they would sell them as their absolute property in their saloon business; and, this being so, it is very questionable whether this power given them, coupled with their relations and course of dealings with each other, is not wholly inconsistent with the retention of title in complainant, and renders void the condition. In the opinion of the writer, the retention of a secret lien and title to merchandise of the kind here involved, delivered to the purchaser to be daily sold at retail in his business, as the property of the purchaser, is contrary to a sound public policy, obnoxious to the purpose of our registration laws, and therefore void. Such a title should not be countenanced and enforced in contravention of the rights of third parties, and especially creditors of the party dealing with the goods, who is clothed with all the usual *indicia* of complete ownership. For the reasons stated we think the chancellor committed no error in this decree."

In the case of Arbuckle *vs.* Kirkpatrick (Tenn.), 39 S. W., 3:

> "A contract by which a manufacturer appointed a firm 'special selling factors' to handle his goods, under which all goods consigned were to remain the property of the consignor until sold at prices fixed by the consignor, the consignees to protect the consignor from any decline in the price, and to have the benefit of any advance, and which required the consignees to remit for all goods consigned at the end of 60 days, whether sold or not, or whether collected for or not, and did not require any report made as to sales, in so far as it affected the rights of third persons, is a contract of sale and not of agency."

The case of Star Clothing Manufacturing Co. *vs.* Nordeman, 100 S. W., 93, decided by the Supreme Court of Tennessee February, 1907, is almost identical with the case at bar. The S. Steinberg Dry Goods Co. ordered a bill of merchandise from the Star Clothing Manufacturing Co., of Tennessee, and said goods were shipped to Newport, Ark., under a contract that the title of said goods should not pass to the vendee until said goods were paid for in full.

Thereafter the vendee was adjudicated bankrupt, and the vendor, not having been paid any of the purchase price for the goods, demanded them of the trustee, who refused the demand and sold the goods; then suit was brought against the trustee to recover the proceeds in the State Court, no objection being raised as to the jurisdiction of the State Court in the premises. The goods consisted of shirts, overalls, etc.

The question presented was whether there could be a lawful conditional sale to a retail merchant for goods to

be resold in and for the purpose of and in the prosecution of his business, or was the retention of title consistent with the nature of a sale made under the circumstances stated.

The Court held that the trustee was entitled to the goods.

In the case of Coweta Fertilizer Co. *vs.* Brown, 163 Fed Rep., 162, the Circuit Court of Appeals of the Sixth Circuit, in passing upon a ontract arising under the laws of Tennessee, wherein it was attempted by the vendor, in the sale of fertilizer, to reserve the title until the price therefor should be fully paid, and when the fertilizer was to be resold at retail by the vendee in the ordinary course of business, it was held void and contrary to public policy.

Decisions of the Federal Courts.

This question is fully considered in a case of the Circuit Court of Appeals, Second Circuit, *In re* Garcewich, 115 Fed. Rep., 87, arising under the laws of New York, to which the attention of the Court is respectfully invited.

The Court, speaking through Circuit Judge Wallace, said:

> "It is the settled law of this State that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to

appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer.

"Luddon *vs.* Hazen, 30 Barb., 650;

"Frank *vs.* Batten, 49 Hun., 91, 1 N. Y. Supp., 705;

"Bonsteel *vs.* Flack, 41 Barb., 435.

"When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely an expression of the confidence by a mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

The Court further said in that case:

"It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fradulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceedings,

> they could have satisfied their claims. Section 70 declares in express terms that the title of the bankrupt shall vest in the trustee to 'all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

The case *In re* Pekin Plow Company, 112 Fed. Rep., 308, decided by the Eighth Circuit Court of Appeals, on page 310, the Court quoted the following:

> "Section 67, subdivision 'a,' provides that: 'Claims which for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against the estate.' "

And said:

> "From the foregoing provisions of the act, it, in our opinion, clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestation for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of his creditors."

And on page 311 the Court said:

> "This language is direct, clear, and free from all ambiguity, and seems to have been chosen by the lawmakers with special reference to statutes relating to fraudulent conveyances."

In re Frazer (Missouri case), 117 Fed. Rep., 747, at the bottom of the page, it is said:

> "That a trustee chosen under the Bankrupt Act of 1898 'becomes the representative of all the creditors, and is possessed of their rights to attack fraudulent conveyances';and that he becomes vested by operation of law of all the property which prior to the filing of the petition in bankruptcy the insolvent debtor could by any means have transferred, 'or which might have been levied upon and sold under judicial process against him.'"

In re Carpenter, 125 Fed. Rep., 831 (New York), the Court, in passing upon a contract very similar to the one at bar, held:

> "Goods purchased to be resold in due course of business cannot be claimed by the seller, as against the trustee of the bankrupt purchaser, where sold under a secret, unrecorded agreement that the title should not pass till payment was completed.
>
> "Under Bankrupt Act, July 1, 1898, c. 541, 70, 30 Stat., 565, vesting in a trustee in bankruptcy title to property transferred in fraud of creditors, an agreement by which title to goods sold to be put into the purchaser's common stock and resold in the due course of his business, and the title to the proceeds of such resales are to remain in the seller until all the purchaser's obligations, existing and future, are met, is invalid as a mortgage against such trustee.
>
> "A trustee in bankruptcy may take advantage of the invalidity of an agreement fraudulent as to the creditors of the bankrupt, the same as a judgment creditor might."

In re Howland, 109 Fed. Rep., 869 (N. Y.), it is held:

> "A reservation of title to merchandise by a seller until payment is made is void as against creditors of the purchaser, where the latter is, by the contract, given the right to sell the merchandise in the ordinary course of business; such right being inconsistent with the ownership of the seller, and one which would necessarily destroy his right of property."

Also consult the following authorities:

In re Benau, 118 Fed. Rep., 471;
In re Frazer, 117 Fed. Rep., 747;
Kellam *vs.* Brown, 112 N. C., 451; 17 S. E., 416;
Chickering *vs.* Bastress, 130 Ill., 206; 22 N. E., 542; 17 Am. St. Rep., 309;
Ex parte White, 6 Ch. App., 397;
Drew *vs.* Smith, 59 Me., 393;
Gross *vs.* Jordan, 83 Me., 380; 22 Atl., 250;
Cleveland McH. Works *vs.* Lang, 67 N. H., 348; 31 Atl., 20; 57 Am. Rep., 566;
Dixson *vs.* Blondin, 58 Vt., 689; 5 Atl., 514;
Marvin Safe Co. *vs.* Norton, 48 N. J. (19 Vroom) 410; 57 Am. Rep., 566;
Mershon *vs.* Moors, 76 Wis., 502; 45 N. H., 95;
Barrel *vs.* Kelley, 66 Vt., 515.

We therefore respectfully pray that the judgment of the Honorable Circuit Court of Appeals for the Eighth Circuit be reversed, and for other relief.

This December 23, 1908.

JAMES K. JONES,
WILLIAM H. ARNOLD,
Attorneys for Appellant.

3

Office Supreme Court,
FILED.
MAR 1 1909
JAMES H. McKENN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

Number 172.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

VS.

SWOFFORD BROS. DRY GOODS CO., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

ERNEST S. ELLIS,
WEBBER & WEBBER,
Attorneys for Appellee.

EDGAR C. ELLIS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

Number 172.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

VS.

SWOFFORD BROS. DRY GOODS CO., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

This is an intervention by Swofford Bros. Dry Goods Company, asking that the proceeds of certain merchandise, notes and accounts now in the hands of Thad. A. Bryant, trustee of E. M. Newton & Company, bankrupts (and held by him, *pendente lite*, under the terms of a stipulation), be turned over to intervener as its property.

STATEMENT OF FACTS.

Prior to the 30th day of June, 1905, E. M. Newton & Company were in business as merchants. For several years they were located at New Louisville, Arkansas, but later moved to Texarkana, where, soon after, failure resulted. The firm was

composed of E. M. and John F. Newton. E. M. Newton was the managing partner, and had full charge and control of the business. Until 1904 the firm conducted both wholesale and retail stores, but in the summer of that year decided to, and did, close out and dispose of their retail business, and afterward confined themselves to the jobbing trade. Their net worth was then over $15,000.00. (Rec. pp. 137-8-9, 67.)

Up to that time Swofford Bros. Dry Goods Company (a corporation), manufacturers and wholesalers at Kansas City (hereinafter referred to as Swoffords), had extended to Newton & Company (hereinafter referred to as Newtons) a line of credit limited to about $5,000.00; but when the latter decided to embark in the wholesale business exclusively and more extensively, and asked to enlarge their indebtedness, Swoffords were unwilling to meet their increased demands for goods and to extend in the regular way the additional line of credit requested. The old account was then closed up and a new and different arrangement was made for future dealings by the execution, on the 20th day of July, 1904, of the conditional sale contract set out by the Court of Appeals in its finding of facts (Rec. 199) and on page 9 of this brief.

This instrument was not recorded, *there being no law in Arkansas either requiring or permitting the recording of conditional sale contracts.*

Under said contract Swoffords sold and delivered to Newtons, between its date and April 27th, 1905, goods aggregating in value $15,389.57, and during the same period payments amounting to something over $2,000.00 had been made from time to time to apply upon the purchase price, leaving a balance due to Swoffords of $13,310.56.

The merchandise purchased by Newtons under the contract referred to was bought in large quantities for jobbing purposes. It was shipped by Swoffords and kept by Newtons in the original packages. The boxes, packages and goods themselves, when shipped and when returned, bore Swoffords' name, brands, marks and lot numbers, and were therefore easily identified. (Finding of Fact No. 4, Rec. 200.)

On the 30th day of June, 1905, Newtons being unable to pay Swoffords the amount so remaining due, voluntarily returned to it a portion of the merchandise so purchased under said contract, worth at cost price $5,337.21, and at the same time upon demand they endorsed and delivered to Swoffords certain customers' notes aggregating, at face value, $1,684.32, and assigned to it certain book accounts aggregating $8,277.04 as being the proceeds derived from sales of goods purchased under said contract. (Rec. 200.) Said assignment was in writing, and (omitting the list of names attached thereto) reads as follows:

"In pursuance of our contract, dated July 20th, 1904, with Swofford Bros. Dry Goods Company, and for value received we hereby sell, assign, transfer and deliver to said Swofford Bros. Dry Goods Company, the following book accounts, aggregating $8,227.04, due and payable to us for goods of the said Swofford Bros. Dry Goods Company, sold and delivered by us to customers here listed under the contract above referred to. Witness our hands this 30th day of June, 1905."

"Witness: Leo Krause."

"E. M. NEWTON & Co.,
By E. M. Newton."

BANKRUPTCY.

On the 3rd day of July, 1905, three days after Swoffords had been given complete possession of said merchandise, notes

and accounts, Newtons filed their voluntary petition in bankruptcy, and were adjudicated bankrupts by Hon. A. H. Sevier, Referee, to whom the case was duly referred. Thad. A. Bryant (appellant) was appointed receiver of their estate in bankruptcy, and duly qualified. Acting under the order of the referee, he immediately demanded of Swoffords the goods, notes and accounts which it had so received from Newtons, but his demand was refused. (Finding No. 8, Rec. 200.)

Negotiations were then begun between the receiver and the referee on one part and Swoffords on the other, looking to the preservation of said property and the avoiding of loss and deterioration in the value thereof pending any litigation which might ensue regarding same; and on the afternoon of July 4th the following stipulation (Finding No. 8) was entered into between Swoffords and the receiver, and approved by the referee:

STIPULATION.

(Title of court and cause omitted.)

"Whereas, E. M. Newton & Company, the above named bankrupts, on the 30th day of June, 1905, returned and delivered to Swofford Bros. Dry Goods Company merchandise invoicing at original cost price $5,337.21, *which had been sold and delivered to said bankrupts by said Swofford Bros. Dry Goods Company under and by virtue of a written contract between said parties, bearing date July 20th,* 1904, and at the same time pursuant to said contract said bankrupts transferred and delivered to said Swofford Bros. Dry Goods Company notes of the face value of $1,684.32 and accounts of the face value of $8,277.04, *which are hereby admitted to be the proceeds of other merchandise sold and delivered by said Swofford Bros. Dry Goods Company to said bankrupts under and by virtue of the contract aforesaid,* and by said bankrupts sold and delivered to their customers in the regular course of trade pursuant to said contract, *and said Swofford Bros. Dry*

Goods Company are in the actual, sole, exclusive and adverse possession of said merchandise, notes and accounts above mentioned, and have refused to surrender the possession of the same to the receiver of the estate of said bankrupts, *except under the admissions, terms and stipulations of this agreement;* and whereas the receiver of said estate now claims, and the trustee to be hereafter elected may claim that said merchandise notes and accounts belong to the estate, now, therefore, to avoid deterioration in the value of said property which would necessarily ensue pending any litigation or proceedings that may arise concerning same, it is hereby stipulated and agreed by and between Swofford Bros. Dry Goods Company and T. A. Bryant, receiver herein, *by and with the authority and approval of the referee* in bankruptcy, that the said merchandise, notes and accounts held by the said Swofford Bros. Dry Goods Company may be offered for sale and sold by the receiver at the time and place of sale of the stock of merchandise of the above named estate now in his hands, it being agreed and understood that the notes and accounts herein referred to shall be sold separately and apart from the balance of the property, and that said merchandise shall first be offered for sale separate, and apart from said other property, and the highest and best price there bid for same shall be deemed and considered the price received therefor, even though said receiver or trustee may thereafter, if he deem it advisable, sell all merchandise, including that herein referred to, in bulk; and upon making said sale, said receiver shall take from the proceeds set apart as a separate fund the amount received from the sale of the notes and accounts aforesaid, and shall also set apart in said separate fund an amount of money equal to the highest bid received on said merchandise when offered separately, and the amount thus set apart for the notes and accounts and said merchandise, shall be held by the court and deposited in bank until all questions regarding the title and right of possession to the same are finally settled and determined by a court of competent jurisdiction, whereupon, if determined in favor of Swofford Bros. Dry Goods Company, said amount is to be forthwith turned over to said Swofford Bros. Dry Goods Co., or its attorney, free and discharged of all fees, charges and expenses, of whatever kind or nature; and it is further agreed and

understood that the fund so derived from the sale of said merchandise and notes and accounts as aforesaid and held intact as a separate fund shall remain and be in lieu of the property so sold, and the title and right of possession of the Swofford Bros. Dry Goods Company in and to said fund shall be and remain the same as its title in and to the merchandise, notes and accounts aforesaid.

It is further agreed and understood that said Swofford Bros. Dry Goods Company is to be in no wise prejudiced by the fact that the proceeds of said sale are paid into and retained by said court until the termination of such litigation as may arise.

Dated this July 4th, 1905.

SWOFFORD BROS. DRY GOODS COMPANY,
By E. S. ELLIS, *Its Attorney,*
T. A. BRYANT, *Receiver.*

Approved: A. H. SEVIER, *Referee.*

Following the execution of, and under, said stipulation, Swoffords delivered the merchandise and the notes and accounts in controversy to the receiver, who (after being elected and qualified as trustee) sold the merchandise for $3,135.00. The notes and accounts were not sold at that time, but at the time of the hearing herein before the master, the trustee had collected $2,500.00 on the notes and accounts, and he has kept all such proceeds in a separate fund, as provided in said stipulation. (Finding No. 9, Rec. 201.) (*Since the hearing, the notes and accounts remaining uncollected have been sold by the trustee, but this fact is not shown by the record.*)

THE PLEADINGS.

Thereafter, Swoffords filed a petition in intervention (Rec. pp. 168) setting up the facts in detail substantially as herein stated, attaching thereto copies of the contract of conditional sale, the written assignment of the notes and accounts and the

stipulation with the receiver, and asked for an order requiring the trustee to deliver to it said property or the proceeds thereof.

The trustee answered and intervenor replied, and upon the issues so joined testimony was taken before the referee as special master. But at the close of the testimony the master, over the objection of intervener, permitted the trustee to file an "amended and substituted answer" (Rec. p. 183) which admitted substantially all of intervener's claims, and made the larger part of the evidence then taken unnecessary.

In his "substituted answer" the trustee abandoned many of the allegations of his previous answer, and rested his case upon three propositions, viz: (1) That said stipulation had been entered into by the receiver and approved by the referee through fraud and mistake of fact, and therefore same was not binding on creditors of the bankrupts; (2) that the conditional sale contract of July 20th, 1904, under which the goods had been sold by Swoffords, was void as to the trustee and creditors of the bankrupts for want of recording; (3) that some of the goods returned by Newtons had not been purchased of Swoffords and that the notes and accounts assigned were not exclusively the proceeds of Swoffords' goods.

But said substituted answer of the trustee did not contain any of the allegations required by Section 60 of the Bankrupt Act as a condition precedent to recovery on the part of the trustee; that is to say, said substituted answer did not allege: (1) that Newtons were insolvent at the time they delivered the property in controversy to Swoffords; (2) did not allege that Newtons had creditors other than Swoffords of the same class, or of any class whatever; (3) it did not allege that the intention of Newtons and the effect of the delivery of said property was to

enable Swoffords to obtain a greater percentage of its debt than other creditors of the same class; (4) it did not allege that Swoffords knew of the insolvency of Newtons and had reasonable cause to believe that a preference to them was intended.

But, notwithstanding the trustee in said answer attacks the validity of the stipulation under which the property in controversy came into the hands of the court, *no return of such property to Swoffords was ever made by him or tendered.*

Intervener replied, denying the allegation of fraud and mistake in the execution of said stipulation; alleging that the trustee was estopped from claiming fraud or mistake in the execution thereof so long as he ratified the same by continuing to hold the disputed property thereunder; averring that the trustee stood merely in the shoes of the bankrupts and was bound by their acts, and that he was in no sense a creditor, mortgagee, or subsequent purchaser in good faith. (Rec. 187.)

REPORT AND JUDGMENT.

The special master made a report (Rec. 145) holding the conditional sale contract of July 20th, 1904, valid and binding, and finding in favor of Swoffords as to the goods returned and notes indorsed to them by Newtons. But he ignored the stipulation entered into by the receiver and approved by the referee, and finding that the proceeds of goods bought from Swoffords under said conditional sale contract constituted fifty per cent of all the book accounts of Newtons, recommended that the same should be equally divided—those assigned to Swoffords as well as those turned over to the trustee—between Swoffords and the trustee.

Both sides filed exceptions to the master's report. (Rec. pp. 152, 155.) The District Court, however, in rendering its deci-

sion, referred neither to the report nor to the exceptions filed thereto; but, ignoring both, held that the contract of July 20th, 1904, was a mortgage and void as against the trustee for want of recording, and decided entirely in favor of the trustee. (Rec. p. 157.)

From the ruling of the District Court intervener appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which reversed the judgment of the lower court, and ordered a decree entered in favor of intervener.

With its opinion the Court of Appeals filed findings of fact, and conclusions of law (Rec. 193, 198 *et seq.*) which, for more convenient reference we copy below, omitting therefrom only the signatures and the title of court and cause.

FINDINGS OF FACTS.

(Rec. 198 *et seq.*)

"On July 20, 1904, Ernest M. Newton and John F. Newton, partners, as E. M. Newton & Co., merchants at wholesale and retail in Arkansas, and Swoffords Bros. Dry Goods Co., a corporation of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

'KNOW ALL MEN BY THESE PRESENTS: That E. M. Newton & Co., of New Louisville, Lafayette County, Arkansas, a co-partnership, composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co., and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co., certain goods upon the following express conditions:

'1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Louisville, Arkansas, from which place they shall not be removed without the written consent of said second party save and except that said first party shall have the right

to sell said goods in the ordinary course of business, but not otherwise.

'2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the articles so sold and shipped with the price and value of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

'3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co., until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co., in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same either in its name or in the name of E. M. Newton & Co., by suit or otherwise, and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous, and any new notes taken thereafter, whether in the name of Mr. E. M. Newton & Co., or in the name of said Swofford Bros. Dry Goods Co. shall be held and considered in all respects the same as the original evidence of indebtedness.

'4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co. and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co. so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right

to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof, by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party and the placing of the same in their stores and warehouses at New Louisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms of this contract, and it shall not be necessary or essential that the fact that goods ordered by first party or sold and shipped by second party are within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

'Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise, shall not cancel the indebtedness thereof but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

'In Witness Whereof, the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

E. M. NEWTON & Co.,
SWOFFORD BROS. DRY GOODS CO.
By W. N. MOORE, *Sec.*"

"2. The contract was not filed or recorded.

"3. Pursuant to the contract, and prior to June 30, 1905, the Dry Goods Company delivered to the Newtons goods of the value of $15,369.57. The latter paid on account thereof the sum of $2,059.01. On June 30, 1905, the unpaid balance was $13,310.56.

"4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other

parties, but they were of such character and contained such marks as rendered them capable of being identified and separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.

"5. On June 30, 1905, when the Newtons were insolvent and the Dry Goods Company knew it, they surrendered to the Dry Goods Company, as belonging to it, under the provisions of the contract, goods of the value of $5,337.21, notes to the amount of $1,684.32 and customers' accounts to the amount of $8,277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract, and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the Dry Goods Company.

"6. In fact, the goods surrendered to the Dry Goods Company were, with slight exception, goods that had been delivered under the contract, but only about one-half in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

"7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the Dry Goods Company was listed as a secured creditor with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes and accounts; that the notes and accounts were proceeds of the goods furnished by the Dry Goods Company under the contract and resold by the Newtons to their customers, and that the goods, notes and accounts were then in possession of that Company.

"8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the Dry Goods Company possession of the goods, notes and accounts mentioned. The demand was refused, but afterwards the Dry Goods Company surrendered them to the receiver under a written stipulation that

they might be disposed of by him in connection with the sale of the other property in his hands, but that the Dry Goods Company should not be prejudiced thereby, and the proceeds should be held in lieu of the property so surrendered to abide the determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company prevailed it should have the proceeds free of fees, charges and expenses. As one of the conditions upon which it was made it was expressly admitted in this stipulation that the goods, notes and accounts in controversy were then in the actual, exclusive and adverse possession of the Dry Goods Company; that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the Dry Goods Company and the receiver, and the referee duly endorsed his approval thereon. Upon the faith thereof the goods, notes and accounts were then surrendered to the receiver. No fraud nor deception was practiced by the Dry Goods Company upon the referee or the receiver in connection with the making of the stipulation.

"9. Thad. A. Bryant, who had been receiver, was duly selected as trustee. He sold the goods in controversy for $3,135.00. The notes and accounts were not sold, but at the time of the hearing of this matter before the referee he had collected $2,250.00 on account thereof, and still retained in his hands those that were uncollected. He has kept a separate account of these funds, and held sufficient funds to answer the result of the litigation.

"10. The Dry Goods Company thereupon presented its intervening petition, seeking the payment to it of the sums realized as mentioned in the preceding finding and the restitution to it of the uncollected notes and accounts. The controversy in this cause was presented by the intervening petition, the trustee's answer thereto and the reply of the Dry Goods Company.

CONCLUSIONS OF LAW.

"1. The contract of July 20, 1904, is a contract of conditional sale and not a mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

"2. Under the laws of Arkansas the contract was valid as between the parties thereto notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

"3. It was also valid, as between the parties thereto, not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendees to their customers, and which could be so identified and segregated.

"4. The contract being valid under the local law, as between the parties thereto, the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

"5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation, made with its approval and without practice of fraud or deceit, that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

"6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250, the collection of notes and accounts in controversy made by the trustee prior to the hearing before the referee, and also for such collections as may have been made since that time, and for the surrender of such of said notes and accounts as remain uncollected, and for costs. The sums mentioned should be paid in full."

OPINION OF THE COURT.

By Hook, Circuit Judge (Rec. p. 193, *et seq.*)

"The appellant intervened in the bankruptcy proceedings claiming to be the owner of certain goods, notes and accounts under the terms of a written contract made with the bankrupts

about a year before the proceedings were instituted. The contract provided, in substance, that appellant should sell goods to the bankrupts to be resold by them in the usual course of their business in Arkansas, but that the title to and right of possession of all goods delivered under the contract and of all proceeds of resales thereof, whether in cash, note or book account, should be vested and remain in appellant until the purchase price had been fully paid to it; that except for the right to resell the goods in the ordinary course of their business the bankrupts should not remove them from the city in which they were doing business; also that they should keep the goods insured for the benefit of appellant. The contract was not recorded. Thereafter and at a time when the bankrupts were insolvent and appellant knew it, they turned over to appellant the remainder of the goods then on hand, and certain notes and accounts which were claimed to be proceeds of other goods obtained under contract and resold by them to their customers. The notes were endorsed and the accounts assigned in writing to appellant. Three days afterwards, voluntary proceedings in bankruptcy were commenced and an adjudication was made. A receiver was appointed who demanded possession of the property from appellant; the demand was refused. Subsequently, however, the goods, notes and accounts were delivered to the receiver under a written stipulation made with the approval of the referee in bankruptcy that the appellant should not be prejudiced thereby: that while the property might be converted into cash, the proceeds should be held to abide the final determination of the controversy as to the ownership. The receiver succeeded himself as trustee. The goods were sold and part of the notes and accounts were collected by him. By its intervention the appellant sought the proceeds of the sale and the collections and such of the notes and accounts as remained on hand. On final hearing the District Court held that the contract under which appellant sold the goods to the bankrupts was in effect a chattel mortgage and not a contract of conditional sale, that it contemplated that the bankrupts as mortgagors should retain possession of the goods with authority to resell them in the usual course of their business and without obligation to pay over the proceeds to the

appellant, and that it was therefore fraudulent and void under the doctrine of Twyne's case obtaining in Arkansas.

The case must be considered upon the assumption that the goods which were returned to the appellant three days before the commencement of the bankruptcy proceedings were part of the identical goods originally sold by it to the bankrupts under the contract, and also that the notes and accounts were proceeds of like goods. When the bankruptcy proceedings were commenced the appellant was in possession of the goods, notes and accounts and claimed them adversely to the receiver. It refused to surrender them until a stipulation recognizing the verity of the facts as claimed by it to exist was made with the approval of the referee. Upon the faith of that stipulation the court of bankruptcy acquired possession. By voluntarily yielding possession of property which was to be the subject of litigation the appellant parted with an advantage well recognized in the law; and the agreement that its rights should not be prejudiced thereby, and that the facts existed upon which its claim of title was predicated, should not be permitted to be repudiated, especially since it received the solemn sanction of the court of bankruptcy, and since the trustee whose present possession depends upon the act of the receiver holds fast to the advantage secured. There was no fraud practiced by the appellant in securing the stipulation and the fact that the receiver and referee may possibly have acted improvidently affords no sufficient cause for ignoring its terms. Therefore, the only questions that are open are those which arise from the face of the original contract, the failure to record it and the fact that the appellant secured possession of the property on the eve of the proceedings in bankruptcy with knowledge of the insolvent condition of the bankrupts.

We are not able to assent to the contention that the contract authorized the bankrupts to resell the goods in the usual course of their business, without obligation to pay the proceeds to appellant. The appellant expressly reserved the title to the proceeds in whatever form they might be and the right to take possession of the notes and accounts arising from resales and collect them for itself. From these provisions an obligation of the bankrupts to account for and pay over such proceeds as they collected is plainly implied, and if it was not fulfilled there

would be a breach of contract as much as if a mortgagor of chattels without power of sales should nevertheless dispose of the mortgaged property and appropriate the proceeds to his own use.

Whether the contract under which appellant claims is one of conditional sale or is a chattel mortgage, and as between the parties thereto whether it is valid and what the effect of the failure to record it may be, are questions to be determined exclusively by the local law. (*Thompson* v. *Fairbanks,* 196 U. S., 516; *Humphrey* v. *Tatman,* 198 U. S., 91; *York Mfg. Co.* v. *Cassell,* 201 U. S., 344.)

Whatever may be the law in some jurisdictions it is authoritatively settled in Arkansas that a contract of conditional sale is valid notwithstanding it contains a provision that the vendee may sell the property in the usual course of his business.

Triplett v. *Implement Co.,* 68 Ark. 230, 57 S. W., 261, involved a contract of that character and the conditional vendor was allowed to recover the goods from the vendee's assignee in insolvency who had taken possession of them. The court cited with approval *Perkins* v. *Mettler,* 126 Cal., 100, 58 Pac., 384; *Dewes Brewing Co.* v. *Merritt,* 82 Mich., 198, 46 N. W., 379, *and Baring* v. *Galpin,* 57 Conn., 352, 18 Atl., 266. In one of these cases the contract of conditional sale of a stock of merchandise expressly provided that the vendee might resell in the usual course of business and in the other two cases resales by the conditional vendees were held to have been in contemplation. In all of them the contracts were sustained as contracts of conditional sale. The contract involved in the Arkansas case provided that the title of the vendor should extend not only to the property, but also to the proceeds of sales thereof made by the vendee. It is true that in this connection the court observed that if the goods were sold by the vendee they were to be sold as the property of the vendor, but we are unable to perceive how this difference is of importance in considering the peculiar circumstances of this case. If a conditional vendee sells the goods and mingles the proceeds with proceeds of his own goods so that they become indistinguishable the vendor may lose title, but the case before us presents no such difficulty. It was expressly agreed in the stipulation that the notes and accounts involved

here were the proceeds of goods delivered to the bankrupts under the contract of conditional sale, and that agreement obviates all difficulties in tracing title. Observing the terms of the stipulation there was no admixture of the proceeds of sales by the bankrupts with the proceeds of other goods. It was as though no other goods had been sold or as though the sales had been made in the name of the appellant and the notes and accounts taken accordingly. Therefore, under the stipulation and the rule of *Triplett* v. *Implement Co.*, it must be held that as between the appellant and the bankrupts the former was the owner of the goods, notes and accounts in controversy. And further that under the doctrine obtaining in Arkansas it would have remained such owner even had an assignee in insolvency of the vendee first secured possession of them. There is no law in Arkansas requiring a contract of conditional sale to be filed or recorded in any public office.

Notwithstanding the views which this and other courts have at times entertained as to the effect of an adjudication in bankruptcy and the right and title of the trustee resulting therefrom it has been definitely settled by the Supreme Court that the trustee is vested with no better right or title than belonged to the bankrupt; that he stands simply in the shoes of the bankrupt, and, as between them, he has no greater right. *York Mfg. Co.* v. *Cassell, supra.* The right of appellant in this case did not first come into existence when it took possession of the property in controversy on the eve of the bankruptcy proceedings. On the contrary it was secured by the contract which was executed almost a year before and it is that date which we must regard rather than the date when possession was taken. The order of the District Court must, therefore, be reversed and the cause remanded for further proceedings in conformity with this opinion."

Of the ruling by the Court of Appeals the trustee now complains and brings the case here.

BRIEF OF THE ARGUMENT.

I.

The stipulation entered into between Swoffords and the receiver, under the supervision and with the approval of the referee, by virtue of which Swoffords surrendered possession of the property in controversy to the court, and under which it was later sold by the trustee who now holds the proceeds, is valid and binding on the parties to this action, and can not be repudiated nor ignored by the trustee. The acceptance and retention of benefits thereunder by the trustee operates as a ratification of same on his part, and as a waiver of any lack of authority or irregularities in its execution.

II.

Under said stipulation the facts as to whether all of the goods returned by Newtons to Swoffords were actually bought from them, and as to whether the notes and accounts assigned by Newtons to Swoffords represented exclusively proceeds derived from a sale of their goods, has been settled and agreed upon, and are not questions to be litigated in this action. Judgment in relation thereto must, therefore, be made upon the basis of said stipulation.

III.

The written instrument of July 20th, 1904, executed by Swoffords and Newtons, and under which the property in controversy was sold by Swoffords and later returned to it by Newtons, is a contract of conditional sale; and there is no law in Arkansas which either requires or permits it to be filed or re-

corded. It is valid between the parties, and valid, also, against the trustee in bankruptcy, who stands merely in the shoes of the bankrupts, and is in no sense a creditor armed with process, a subsequent mortgagee or a purchaser in good faith.

IV.

But if said instrument be construed as a mortgage, it is likewise valid as between the parties, and valid also as against the trustee in bankruptcy for the reasons above stated.

V.

The vital error of the appellant is therefore not so much in placing a wrong construction upon the contract itself, as in defining the status of the trustee in relation to it under the law and the facts and circumstances of this case.

VI.

The answer of the trustee does not state facts sufficient to constitute a defense to intervener's petition, or to show a right to recover vested in him, because it does not allege; (1) That Newtons were insolvent at the time they transferred to Swoffords the property in controversy; (2) That Newtons had creditors, other than Swoffords, of the same class; (3) That the intention of Newtons and the effect of the transfer was to enable Swoffords to obtain a greater percentage of their debt than other creditors of the same class; (4) That Swoffords knew of such insolvency, and had reasonable cause to believe that such a preference was intended by Newtons.

ARGUMENT AND BRIEF.

The first question raised by appellants is as to the power and authority of the receiver, under the direction and with the approval of the court, to enter, with Swoffords, into the stipulation of July 4th, 1905 (shown in full at page 5 hereof, and at page 176 of the record), under the terms of which the property in controversy came into the hands of the court.

Never, since the decision was rendered by this court in *Bryan* v. *Bernheimer*, 181 U. S., 188 (21 Sup. Ct. Rep., 557), has there been any doubt of the jurisdiction and authority of courts of bankruptcy to not only take possession by and through a receiver of property claimed to belong to the bankrupt in the hands of adverse holders, but to hear and adjudicate the rights of such adverse holders prior to the election and qualification of a trustee. In that case the exact question is thoroughly discussed and fully decided.

And if, as is there decided, the receiver, representing the the estate, has power and authority to frame and conduct the trial of the issues involved, it necessarily follows that such receiver has power and authority to make such agreements and stipulation in the matter as may become necessary or which may be deemed expedient. And especially is this true, where, as in the case at bar, the stipulation of the receiver is made under the direction and with the approval of the court itself.

Stipulations made during the progress of, or in regard to litigation are upheld and favored by the courts. Where an agreement is made in relation to the facts, it has the binding force of a finding by a court or jury. (20 Ency. Pl. & Pr.,

622, 668 and notes.) A stipulation will be construed like other contracts or written instruments *inter partes,* (Id., 657); they can only be avoided or set aside for the same reasons that would avoid other contracts (Id., 662); and then only in cases where the parties can be placed in *statu quo* (Id., 663); "there is no rule of law better settled, and none can be more equitable and just, than that where a party to a cause is relieved from his own stipulations, the adversary should be restored to all the rights he had when such stipulations were entered into" (Id., 669). In order to obtain relief against a stipulation the regular course is not simply to ignore or attempt to evade it, but to make a formal application to the proper court for its revocation (Id., 666).

But, under the circumstances of this case, as shown by the findings, the issue sought to be raised by appellant as to the power of a receiver, is a false one. A decision of it now cannot control—cannot even affect—the ultimate result in this case. For the stipulation is no longer an executory contract. It has been executed fully and completely on the part of Swoffords, and just as fully and completely on the part of the court, through its officials, the receiver and trustee, with the sole exception of turning over the proceeds of the property obtained thereunder. The trustee, by his course and conduct, has approved, ratified and adopted the stipulation made by the receiver, and has reaped the benefits accruing to him and to the estate of the bankrupts thereunder. It is elementary that one cannot accept the benefits of a contract, and at the same time avoid and repudiate the burdens thereby imposed. Regardless of whether, in law or in fact, the receiver was clothed with authority to make the stipulation in the first instance, the trustee

is now in the familiar position of a principal who has accepted the benefits of an unauthorized contract made by his agent, or by a person wrongfully assuming to be his agent, and who has thus by ratification or by the doctrine of estoppel given to the contract all the force and virtue it would have had if originally authorized.

That there was neither fraud nor deception on the part of Swoffords in the making of the stipulation is expressly found in finding number 8; and such finding is in exact accord with the personal statement of the referee made on the record at page 44. But if the facts were otherwise the trustee cannot repudiate the instrument while he still retains benefits thereunder.

Swoffords may have acted improvidently in making the stipulation, or it may have been an improvident act on the part of the court; but we insist that the trustee can no more repudiate the terms of the stipulation under which he, with the approval of the court, obtained and still holds possession of the property in dispute, than Swoffords may now repudiate the sale of the property made by the trustee under its terms, and insist, in case of recovery, upon an order for the return of the identical goods, or that their value be ascertained in some manner other than by the sale therein agreed upon.

And is not the suggestion made by appellant in the closing paragraph of his argument on this branch of the case an idle one?

Is it not absurd to think for a moment that the mere turning over by the trustee to Swoffords of the proceeds derived from a sale of the property after a lapse of nearly four years, and after expensive litigation, extending from the lowest to the highest court, has ensued, will restore the *statu quo* of the par-

ties? Let us reflect: Before signing the stipulation, Swoffords were in the actual and exclusive possession of all the property in controversy. It could have sold the merchandise to customers of its own seeking, at prices and on terms of its own making, and in such lots and quantities as it might choose. These rights and privileges it surrendered by the stipulation, and the merchandise has all been sold under its terms. Swoffords had the right to proceed in its own way to collect the notes and accounts; to sell the same, to compromise, or to secure and extend a part or all them as in its judgment might ultimately bring the best results. These rights and privileges it also surrendered by the stipulation, and the notes and accounts have been collected, so far as collections have been made at all, under methods chosen by the trustee. Many of the notes and accounts have become barred by limitation, and as a matter of fact, (although it does not appear in the record), all remaining uncollected have, since the original hearing in this case, been sold by the trustee. Having realized the money from a sale of the merchandise and from collection or sale of the notes and accounts, Swoffords could have held and used the same pending litigation. This right it likewise surrendered, and as a consequence the proceeds derived by the trustee from the property have been locked up in court for nearly four years, and will remain there to the end, without bearing with it even so much as a partial solace in the way of accumulated interest.

Is it not preposterous for anyone to say that a mere return by the trustee to Swoffords of the bare proceeds of the property in controversy—proceeds derived at such a cost and sacrifice to them—can be deemed an adequate restoration of rights surrendered? Can the dead be brought back to life again?

The trustee has not been misled. His attention was called to the inconsistency of his position at the very beginning in the replies filed by intervener to his answers (Rec. 182, 189). He chose, deliberately, to ignore the stipulation under the very terms of which he was holding the property in controversy, and from which he had received and was still receiving benefits. He is, therefore, too late in asking now to be allowed to return the property, and to seek a recovery on other grounds. If there were nothing else to be considered, to grant such a request would be to permit him to trifle with the courts—to use them merely as a convenient means of experimentation.

II.

For his second ground of complaint, appellant insists that the court of appeals erred in not holding that the contract of July 21st, 1904, was a mortgage or a secret lien which was fraudulent as to creditors.

But here again appellant misses the mark completely, and raises another false issue—sets up another man of straw—and devotes nearly thirty pages of his brief in the argument of a question which has and can have no bearing on the case. For the controversy is not between Swofford and *creditors of the bankrupt,* but between Swoffords and *the trustee standing squarely in the shoes of the bankrupt,* and having no further or additional rights.

We insist that except in the interest of accurate statement, it is wholly immaterial whether the contract of July 20th, 1904, entered into between Swoffords and Newtons, be called a contract of conditional sale or a chattel mortgage, for, upon either theory, under the laws of Arkansas, with the claimant in pos-

session, the instrument is valid and intervenor entitled to recover. We regard the instrument, however, as unquestionably, a contract of conditional sale, and will so first discuss and consider it. And as the laws of Arkansas must govern, we shall confine our citation of authorities to decisions from the Supreme Court of that state.

"The line of discrimination between mortgages and conditional sales cannot be marked out by any general rule; but in every case the true nature of the transaction, and the intention of the parties, must be determined by its own circumstances."

Johnson v. *Clark*, 5 Ark., 321;
Porter v. *Clements*, 3 Id., 364;
Blakemore v. *Burnside*, 7 Id., 505;
Stryker v. *Hershey*, 38 Id., 264;
Hershey v. *Luce*, 56 Id., 320.

While the rule of construction as stated above by the Arkansas court has particular reference to cases where property already owned by a vendor has been transferred with a contract back from the vendee to reconvey to the vendor upon repayment of the purchase price within a given time, and the question to be decided is as to whether the contract back shall, upon default, be strictly construed, so as to bar the vendor, or whether both instruments shall be construed together merely as a loan secured by a mortgage, and the vendor be thus afforded a more liberal right of redemption; still if the rule be applied to the case at bar, the contention of intervenor must be upheld.

CIRCUMSTANCES.

The circumstances surrounding this transaction, briefly stated, were these: Newtons, intending to enlarge their wholesale business, were in the market for large quantities of goods, and their future demands would likewise be heavy. Their pur-

chases of particular merchandise were in large lots—so many cases of this, so many dozens or gross of that—and in the orderly conduct of their jobbing business, such goods must, for convenience and of necessity, be kept together—largely in the original cases and packages in which same were shipped, as is the custom in wholesale houses, and not scattered nor mixed with other goods as in retail stores. The merchandise to be bought of Swoffords would therefore be kept substantially intact until sold, and would retain thereon their name, brands, lot numbers, sale marks, etc., and always be easy of identification; and the fact that other goods likewise bought in case and dozen lots, should also be stored in the same room or building, would not produce confusion. Similarly, sales by Newtons to country merchants would also ordinarily be made in larger quantities than in a retail business, so that the keeping of separate accounts for such of Swoffords' goods as should be sold would not be at all impossible or difficult. Moreover, Swoffords did not care for nor insist upon security beyond that afforded by such of their goods as should remain on hand, and the cash, notes and accounts representing the proceeds of those sold. A conditional sale contract would effect this without interfering with any other goods or any other property, and was therefore peculiarly applicable and desirable.

Not a dollar of old indebtedness was to be secured by the transaction; not a dollar's worth of other merchandise or other property was to be included or affected by a lien. And it has neither been alleged nor shown that a single dollar of old indebtedness was actually paid thereby. Had a mortgage been intended by the parties, undoubtedly the instrument would have been so written as to include all the merchandise of Newtons',

whether purchased of Swoffords or from other parties; and, likewise, undoubtedly the mortgage would have been so drawn as to secure the $5,000.00 of old indebtedness then past due.

But no mortgage was intended or contemplated by the parties. The merchandise being bargained for was Swoffords'; they could sell or refuse to sell, as they chose. They agreed to sell, but upon the *"express condition"* that their title and right of possession should not cease or pass to the vendee until the purchase price was fully paid. In doing this, they took no advantage of anyone; they neither sought nor took hold upon anything but what was unquestionably their own property. Will the court now reconstruct the bargain?

At that time Newtons, as shown by their written statement made to Swoffords (Rec. pp. 137, 69) had a net worth invested in the business of over $15,000—that much more than sufficient to have paid Swoffords and every other creditor in full—so there was neither motive nor necessity for Swoffords to attempt an unfair advantage of other creditors. And, indeed, the contract entered into gives them no unfair advantage. Unlike the ordinary mortgage on merchandise, the contract constitutes no lien upon a general stock; nothing is covered by it except the identical goods bought from Swoffords. Nothing is contained in the contract whereby goods might be sold and the stock replenished with a lien remaining on the old and attaching to the new; nothing in the way of permission to Newtons to convert the proceeds to their own use. No benefits accrue to Newtons, either direct or indirect, except in the application of all the proceeds of sale, when realized upon, including profits, to payment of the purchase price. Their hope lay entirely in the future—in the goods that should remain on hand when the debt was fully paid.

In all these respects the contract here under consideration is wholly unlike and sharply distinguishable from the mortgage discussed in *Robinson* v. *Elliott, 22* Wall, 513, so largely quoted from, and the other cases cited by the learned district judge in the opinion filed by him in the court below, and in appellant's brief filed here. These cases are also clearly distinguishable from the case at bar, in that there the attack on the instrument was made and the question of illegality raised by creditors, subsequent mortgagees or purchasers in good faith, while here the attacking party, the trustee, merely stands in the shoes of the vendee. And this same distinction will be found to exist in every authority cited in this court in behalf of the trustee. For this reason we shall not quarrel with the authorities cited by appellant. They simply discuss the rights of purchasers, subsequent mortgagors or creditors armed with process, and have no application to the issues in this case where none of such parties appear.

A VALID CONTRACT IN ARKANSAS.

Such an instrument as the one between Swoffords and Newtons has not only been construed to be a contract of conditional sale in Arkansas, but it has been held legal and binding by the Supreme Court of that state in *Triplett* v. *Mansur* & *Tebbetts Impt. Co.,* 68 Ark., 230 (57 S. W., 261).

That was an action of replevin brought by Mansur & Tebbetts Impt. Co., of St. Louis, against C. H. Tripplett, as assignee of H. C. McGaughy, to recover certain merchandise sold by plaintiff to said McGaughy, for re-sale, under a contract containing an agreement as follows:

"And it is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the

current season, shall remain in, and their proceeds, in case of sale, shall be the property of Mansur & Tebbetts Implement Co., and subject to their order, until full payment shall have been made for the same by the said McGaughy."

Construing this clause of the contract, the court, by Mr. Justice HUGHES, said:

"According to the contract of the parties, if the goods were sold by McGaughy, they were to be sold as the property of the appellee (the vendors) and the proceeds of the sale were to be and remain the property of the appellee. Such an agreement is valid. *New Haven Wire Co. Cases,* 57 Conn., 532 (18 Atl., 266, 5 L. R. A., 300); *Brewery Co.* v. *Merritt,* 82 Mich., 198 (46 N. W., 379, 9 L. R. A., 270); *Perkins* v. *Mettler,* 126 Cal., 100. The appellant concedes, and the law is, that when personal property is sold under an agreement that the title to the property shall not pass, but remain in the vendor until fully paid for, no act of the buyer can prevent a recovery of the property by the seller, if the same is not paid for. 'When a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed; and a purchaser from the vendee acquires no title, though he buys in good faith, for a valuable consideration, and without notice of the condition.' *McIntosh* v. *Hill,* 47 Ark., 363; *Simpson* v. *Shakelford,* 49 Ark., 63; *Distilling Co.* v. *Shannon,* 60 Ark., 133."

See also:

McRea v. *Merrifield,* 48 Ark., 160;
Carroll v. *Wiggins,* 30 Id., 402.

In the case above quoted from, the assignee insisted, as does the trustee in the case at bar, that where goods are sold to a merchant for the purpose of re-sale the doctrine of conditional sales could not be applied.

That decision ought to be sufficient in itself to satisfy the most critical as to the law of Arkansas regarding contracts like the one in controversy here and in that case discussed; but if any

doubt remains as to the validity of such contracts between the parties and their privies it must certainly be dispelled by reading the authorities there cited, and approved.

THE MICHIGAN CASE.

In the cited case of *Brewery Co.* v. *Merritt,* 82 Mich., 198, it was, by a written contract set out in the opinion, agreed that the Brewery Company should ship to Lentz Bros. all beer ordered by them at the price of $5.75 per barrel, and that the title to such beer should remain and rest in the Brewery Company until sold, but nothing was said as to what should be done with the proceeds of sales. At that time Michigan, like Arkansas at present, had no statute requiring conditional sale contracts to be recorded. A portion of the beer shipped under the contract was seized by the sheriff under an execution against Lentz, and replevin followed. The trial court held that under the contract the absolute title to the beer passed at once to Lentz Bros., and was subject to levy and sale under execution in favor of their creditors, saying:

"If the contract could be upheld it would simply put it in the power of Lentz Bros. to do an extensive business, apparently on their own account, thus giving them a false credit to which they were not entitled in dealing with others."

But this ruling was reversed by the Supreme Court and in the opinion written by Mr. Chief Justice CHAMPLIN, it was said:

"The Brewery Company has a right to say, 'We will fill your order for beer, which you may sell as you choose, but the title shall remain in us until you do sell.' * * * The effect of such contract was that the beer not sold remained the property of the company, and the firm owed them for all they had sold. * * * There is nothing illegal, immoral or corrupt in the contract."

In the case at bar, the learned district judge based his decision adverse to intervener on the ground that the bankrupts were not required to pay over the proceeds of sales to apply upon the indebtedness, although in so doing he wholly overlooked the plain provisions of the contract (Par. 3) that the title to the proceeds of sale *"whether in cash, notes or book accounts, shall be vested and remain in Swofford Bros. Dry Goods Company* until the full purchase price shall be paid in cash." In the Michigan case cited and approved by the Supreme Court of Arkansas, no reference whatever was made in the contract regarding the proceeds derived from sales, and yet the court held the contract valid even as against a creditor armed with execution.

THE CALIFORNIA CASE.

But far stronger in upholding the contention of intervener, both as to the nature and validity of the contract under discussion herein, is *Perkins* v. *Mettler,* 126 Cal., 100; and the case is specially important and significant because it is also cited and approved by the Arkansas court in the decision above quoted from. By the contract there in controversy, the vendor sold a stock of merchandise for $3,792.82, $1,000 to be paid each year in quarterly installments, *and title was to remain in the vendor until the purchase price was fully paid.* But the vendees were given possession with privilege of selling same in regular course of business, and nothing was said as to what should be done with the proceeds. The stock, however, was to be replenished by the vendees at their own expense with new goods so as to keep its value substantially the same. The vendees went into possession and ran the business about eighteen months, when they voluntarily delivered the goods on hand to the vendor and assigned to him the book accounts that had accrued from credit

sales. Immediately thereafter involuntary proceedings in insolvency were commenced against the vendees, and a receiver was appointed, who brought an action against the vendor for the value of the property mentioned. On the trial before a jury, the court refused to give the following requested instruction:

"It is the province of the court to construe and interpret the contract in evidence and the court instructs you that said contract operated to vest the title to the property therein mentioned in Mealey & Co. (the vendees) notwithstanding any terms in said writing to the contrary. And the only interest that defendant had therein was one of lien or security for the indebtedness owing to him thereunder; and the court instructs you that such lien was what the law denominates a secret lien, and was fraudulent and void against the creditors of Mealey & Co. and also against their assignee in insolvency?"

An appeal was taken from the ruling of the trial court in refusing said requested instruction; but same was sustained by the Supreme Court in an opinion delivered by Mr. Justice GRAY, who said in part:

"It is conceded by appellant that the correctness or incorrectness of the court's ruling depends upon the interpretation of the contract. * * * His position is that the contract in question was an attempt to circumvent the chattel mortgage statute in the guise of a conditional sale reserving title in the vendor, and that it had the effect to convey to the vendees named in it the entire ownership of the property. The trial court must have been of the opinion, on the other hand, that the written agreement evidenced a conditional sale with the ownership of the property in the vendor until performance of the conditions. From a thorough consideration of the whole contract we are constrained to agree with the trial court. The intention of the parties, as disclosed by the whole contract, should govern the court in determining whether the sale was absolute or conditional. *Van Allen* v. *Francis,* 123 Cal., 474. It seems plainly apparent that if the contract is given the construction that the

parties to it intended it to receive, and that they gave to it themselves, it will be treated as a conditional sale."

If the same rule is followed in the case at bar, and the construction placed upon the contract that the parties themselves gave it, then it must also be treated as a conditional sale.

In *McRea* v. *Merrifield,* 48 Ark., 160, the Supreme Court of that state also cites, with approval, *Harkness* v. *Russell,* 118 U. S., 363, where Mr. Justice BRADLEY, after an exhaustive review of the authorities, squarely upholds our contention.

NO RECORDING LAW IN ARKANSAS.

In the State of Arkansas, there is no statute either requiring or permitting the filing or recording of conditional sale contracts.

> Conclusions of Law No. 1 (Rec. 200);
> *McRea* v. *Merrifield,* 48 Ark., 160;
> *McIntosh* v. *Hill,* 47 Id., 363, and cases cited, *supra;*
> *Simpson* v. *Shackelford,* 49 Id., 63-66.

And in the absence of such a statute there is neither necessity nor opportunity for recording. An unauthorized record of such a contract is not notice.

> 6 Am. & Eng. Ency. of Law (2nd Ed.), 498, and citations.

The absence of such a statute is an adequate and complete answer to the unfounded charge of secrecy made by the trustee in this case.

As a matter of fact, there is neither allegation nor proof that Newtons contracted a single dollar of indebtedness other than that to Swoffords, after the making of the reserve title contract.

A TRUSTEE IN BANKRUPTCY MERELY STANDS IN THE SHOES OF THE BANKRUPTS.

The underlying infirmity of the trustee's position, and of the opinion filed by the trial court in this case, is an erroneous conception of the status of a trustee in bankruptcy. Although the law regarding conditional sale contracts and chattel mortgages, and its effect upon the interests of the various parties in relation thereto, has long been settled in the several states, upon the enactment of the bankruptcy law it was believed by many that a trustee in bankruptcy was, in some manner, under that act, vested with a power and authority that placed him in a position equal or superior to that of a creditor armed with process, a subsequent mortgagee, or purchaser in good faith. That this view is still entertained by appellant is evidenced from the nature of the authorities cited.

However, the exact status of such trustee and the extreme limits of his power and authority, have been finally and forever settled and determined by this court in *York Mfg. Co.* v. *Cassell,* 201 U. S., 344, where it is held that:

"The trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued."

The facts recited in that case are that the York Manufacturing Company sold to the Mount Vernon Ice Company certain machinery under a contract containing a provision that the title, ownership and right of possession to the machinery sold should remain in the vendor until the purchase price therefor should be fully paid in cash; but the contract was never filed for record. The Mount Vernon Ice Company went into possession of the property, and later were adjudicated bankrupt. Soon after the adjudication the York Manufacturing Company filed an inter-

vening petition, setting forth the conditional sale contract mentioned, alleging default in payment, and praying for an order permitting them to remove the machinery. This petition was resisted by other creditors, and by Cassell, the trustee. Mr. Justice PECKHAM delivered the opinion of the court, and said, in part:

"The question is simply whether the York Manufacturing Co. has a right, under its conditional sale of the machinery to the bankrupt corporation to take the machinery out of the premises where it was placed, as against all except judgment or other creditors having some specific lien. There are no judgment creditors in the case, and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attachment on the property, so as to prevent the York Manufacturing Company from asserting its right to remove the machinery by virtue of the reservation of title contained in its contract."

The court then holds that the state law governs and refers to the statutes of Ohio, and to the decisions of its Supreme Court in relation to conditional sale contracts and mortgages. It finds that, although not filed for record the contract was in Ohio (as it would be in Arkansas) valid as between the parties to it, and valid as against all persons who had not secured liens on the property by attachment, execution or otherwise. Proceeding then to discuss the status of the trustee, the court continues:

"We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the Court of Bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests on the bankrupt's estate. *We are of the opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof.* Under the provisions of the bankrupt act the trustee

in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. *The trustee,* under such circumstances, *stands simply in the shoes of the bankrupt, and as between them, he has no greater right than the bankrupt.* This is held in *Hewitt* v. *Berlin Mach. Works,* 194 U. S., 296, 48 L. Ed., 968, 24 Sup. Ct. Rep., 690. The same view was taken in *Thompson* v. *Fairbanks,* 196 U. S., 518, 49 L. Ed., 577, 55 Sup. Ct. Rep., 306. It was there stated that 'under the present bankrupt act, the trustee takes the property of the bankrupt in the same plight and condition that the bankrupt held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' See *Yeatman* v. *New Orleans Sav. Inst.,* 95 U. S., 764, 24 L. Ed., 589; *Stewart* v. *Platt,* 101 U. S., 731, 25 L. Ed., 816; *Hauslet* v. *Harrison,* 105 U. S., 401, 26 L. Ed., 1075. The same doctrine was reaffirmed in *Humphrey* v. *Tatman,* 198 U. S., 91, 49 L. Ed., 956, Sup. Ct. Rep., 567. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated. In this case, under the authorities already cited, the York Manufacturing Co. had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy, did not operate as a lien upon the machinery in favor of the trustee."

And in the more recent case of *Warehousing Co.* v. *Hand,* 27 Sup. Ct. Rep., 720, the rule thus stated has been reaffirmed by this court.

What is said above regarding the law of Ohio is equally true of the law of Arkansas, for in that state, as we have shown by the decisions of its Supreme Court, in *Triplett* v. *Mansur* & *Tebbets Impt. Co.,* and other cases cited, *supra,* a conditional sale contract is good between the parties without recording. The

doctrine of *York Mfg. Co.* v. *Cassell* therefore applies with full force. Indeed, in the case at bar, the facts are even stronger in favor of intervener, for here the contract has been fully executed by the parties themselves, and possession delivered under its terms before bankruptcy ensued.

In justice to the trial court, we desire to say that, although previously rendered, the opinion in York Mfg. Co. v. Cassell, supra, had not been published at the time this case was decided, and the court's attention was not called thereto.

THE CONTRACT CONSIDERED AS A MORTGAGE.

But if we are to blind ourselves to the terms of the instrument itself, and to all the facts and circumstances surrounding its execution, which, as we have seen, so plainly stamp it as a contract of conditional sale, and if we regard it merely as a mortgage, it will be found that the Court of Appeals is correct in its conclusions, and intervenor must recover. For, in Arkansas, an unrecorded mortgage is valid as between the parties.

It is true that Arkansas has a statute regarding the filing or recording of mortgages, but it will be seen that such statute, under the construction given it by the courts of that state, has no application whatever to the facts of this case. Swoffords, if "mortgagees" at all, were "mortgagees" for a present consideration and the mortgage was executed by solvent parties. It was not therefore, voidable, as a preference, even if given within four months. Not only this, but there are no *subsequent mortgagees, no creditors armed with attachment, execution or other process;* and three days before the commencement of any bankruptcy proceedings, Newtons had voluntarily delivered to Swoffords the merchandise remaining unsold, and had, under the terms of the so-called "mortgage" turned over to them the

notes and accounts in controversy as being the proceeds derived from the sale of goods disposed of.

In other words, the receiver, and the trustee, as his successor, stepped into the shoes of the bankrupts after a full and voluntary compliance on their part with the terms of the "mortgage" after default, and before bankruptcy and it only requires a limited reference to the Arkansas authorities to determine the rights of the parties.

"A chattel mortgage, though not filed for record, is a valid security between the parties; and when, by virtue of it, the mortgagee takes possession of the mortgaged property, his title is good against a creditor of the mortgagor who subsequently attaches the property in his possession."

Applewhite v. *Harrell Milling Co.*, 49 Ark., 279;

Citing with approval:

Jones Chat. Mort., Sec. 178;
Frank v. *Miner*, 50 Ill., 444;
Hauselt v. *Harrison, Assign. in Bkcy.*, 105 U. S., 401;
Petring v. *Herr Dry Goods Co.*, 90 Mo., 649.

"A mortgage which has not been acknowledged nor recorded as required by the statute is, nevertheless, good as between the parties; and upon breach of the condition of payment, may be enforced against the mortgagee, and, on his death, against his administrator, in preference to his general creditors."

Haskell v. *Sevier*, 25 Ark., 152;
Main v. *Alexander*, 9 Id., 112.

"Under the laws of Arkansas, if a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title is good against everybody, if it was previously valid as between the parties, although the instrument is not acknowledged and recorded. The delivery cures all such defects."

Garner v. *Wright*, 52 Ark., 385;

Citing with approval:

Jones Chat. Mort., Sec. 178, and cases cited;
Applewhite v. *Milling Co.*, 49 Ark., 279;
Cameron v. *Marvin*, 26 Kan., 625;
Hutton v. *Arnett*, 51 Ill., 198.

"Before other creditors of a mortgagor can take advantage of an unacknowledged and unrecorded mortgage, they must be armed with process."

Martin v. *Ogden*, 41 Ark., 186;
Ringo v. *Wing*, 49 Id., 457;
Haskill v. *Sevier*, 25 Id., 152.

Thus, under the law of Arkansas, the right of Swoffords to the property in their possession at the time of the institution of bankruptcy proceedings was perfect, and must be so declared, unless the bankruptcy law fixes a different rule—unless, under its provisions, the trustee in bankruptcy stands in a better position than the bankrupts and their general creditors. But, as we have already seen, that question has been thoroughly discussed and permanently settled in favor of the intervenor by the Supreme Court of the United States in *York Mfg. Co.* v. *Cassell*, 201 U. S., 344, from which we have already quoted at length, and in *Thompson* v. *Fairbanks*, 196 U. S., 516, *Humphrey* v. *Tatman*, 198 U. S., 91, and other cases before cited. In the cases last named, it is not only held that the trustees stands squarely in the shoes of the bankrupts, *but that the delivery of possession relates back* to the date of the instrument itself.

Whatever may be the rule in Arkansas regarding the validity of the instrument of July 20th, 1904, as between the vendor and subsequent mortgagee or creditors armed with attachment or execution, it is very clear from the Arkansas decisions cited, that whether the instrument be considered either as a contract of conditional sale or as a mortgage resting as it did upon a

new and present consideration, it is good as between the parties thereto, and since the trustee occupies the same and no better position than the bankrupts themselves, the contract is good as against him, and the Court of Appeals is correct in its opinion and judgment.

III.

CONFUSION OF GOODS—ESTOPPEL.

Appellant seems to believe that some advantage should accrue to him from the finding of the Court of Appeals that the goods surrendered to Swoffords by Newtons "*were, with slight exception,* goods that had been delivered under the contract."

Swoffords made an effort in good faith to procure a return of its goods, and of its goods alone. If they did not succeed in so doing the fault lies wholly with Newtons, and, therefore, they cannot be heard to complain. For if, under the methods pursued by them, such confusion occurred, either as to the goods or as to the notes and accounts, that an exact separation could not be made, Swoffords were entitled to take all.

"If a mortgagor so confuses the mortgaged goods with his own that they cannot be distinguished, and refuses to separate them, the mortgagee may take all such goods. * * * When new goods have been added to a mortgaged stock, it is the duty of the mortgagor to identify the latter upon the mortgagee's taking possession. Although there be no such confusion of goods as to absolutely destroy their separate identity, yet, if they cannot be separated without the mortgagor's aid, the same mischief would be produced as that which follows a confusion of goods. If the mortgagor refuse to point out the mortgaged goods so as to enable the mortgagee to select them from others with which the mortgagor has mixed them, the latter cannot complain if the mortgagee seize the whole. Neither can other

creditors of the mortgagor complain of such seizure if it be made before they have acquired definite rights by attachment or levy."

Jones, Chat. Mort., Secs. 481, 482, and cases cited.

Neither can the trustee complain, for he stands merely in the shoes of the bankrupts—the mortgagors—and is bound and estopped by their acts.

York Mfg. Co. v. *Cassell, supra.*

IV.

THE ANSWER OF APPELLANT IS INSUFFICIENT.

While we entertain no doubt of the result in this case with a hearing based entirely upon the original contract of conditional sale, the stipulation and the findings of fact, at the same time we insist that, regardless of all these, judgment must be for intervenor, for the reason that the several answers filed herein by appellant do not state facts sufficient to allow him to recover.

For the orderly conduct of proceedings of this kind, and that the opposing parties may be duly advised of the claims and charges they are expected to meet with proper evidence, pleadings are required and are essential the same as in any other action; and the parties should be held to as strict a compliance with the rules of pleading as in other litigation.

At the opening of the trustee's defense before the master, we objected to the introduction of any evidence in his behalf on the ground that his answer (Rec. 182) did not state facts sufficient to constitute any defense to intervenor's petition. The objection was overruled, and one of the exceptions filed by intervenor to the master's report was based on that ruling. (Rec. 155.) But in deciding the case the District Court ignored our exceptions, as well as the master's report. We again raised the

question in the assignment of errors filed in the Court of Appeals (Rec. 163) but are still without a decision thereon. Nevertheless, we still believe our objection to have been well taken.

In the stipulation entered into between Swoffords and the court it was expressly agreed that the rights of the former should not be in any way prejudiced thereby, but should remain precisely the same as though it still held actual possession of the property. The position of the trustee is therefore the same as though he were the attacking party, and had brought an independent action to recover the property or its value, and his pleading must contain the same essential allegations.

Even if it were true that the property in controversy had been transferred by Newtons to Swoffords three days before bankruptcy, solely in payment of indebtedness, and without any previous contract relating thereto, the only right of the trustee would be to attack the transaction and to recover the property in controversy from Swoffords, by virtue of Sec. 60 of the bankruptcy act. That is to say, the trustee must allege and prove that the transaction constitutes a "preference" to Swoffords within the meaning of that section.

And before the trustee may recover he must allege and prove: (1) That Newtons were insolvent at the time they delivered the property to Swoffords; (2) that Newtons had creditors, other than Swoffords, of the same class; (3) that the intention of Newtons, and the effect of the delivery of said property was to enable Swoffords to obtain a greater percentage of its debt than other creditors of the same class; (4) that Swoffords knew of the insolvency of Newtons and had reasonable cause to believe that preference to it was intended.

Bankruptcy Act, Secs. 60a, 60b;
Baden v. *Bertenshaw, Trustee,* 68 Kan., 32;

Whitson v. *Farber Bank,* 105 Mo. App., 605;
Edwards v. *Carondolet Milling Co.,* 108 Mo. App., 275;
Swartz v. *Siegel-Hillman D. G. Co.,* 183 Mo., 438;
Pirie v. *Trust Co.,* 182 U. S., 438;
In re Eggert (C. C. A.), 102 Fed., 735.

In neither the original (Rec. 178), the amended (Rec. 179), nor the "amended and substituted answer" of the trustee (Rec. 185), is there a single one of the several allegations required. It is nowhere alleged that Newtons were or ever had been insolvent; it is nowhere alleged that the transfer was intended as a preference; nor that by reason thereof Swoffords would receive a larger percentage of its debt than other creditors of the same class. Indeed, *there is no allegation that there was ever any other creditor of any class.*

In some way the attorneys for appellant seem to have entertained the idea that the involuntary petition of the bankrupts on file, with the several schedules thereto attached, sufficiently established the insolvency of the Newtons and the existence of other creditors, and wholly obviated the necessity of allegations and proof in that respect. But far from filling the office of allegations in a petition filed by the trustee to recover alleged preferences, the schedules attached to the bankrupt's petition are not even evidence. So far as this case is concerned they are merely subsequent self-serving declarations of the bankrupt, made *ex parte* and without even an opportunity for cross examination.

1 Greenleaf on Evidence (13th Ed.), Sec. 178.

And no more does the order of adjudication constitute either an allegation or proof of insolvency. True, Newtons filed their voluntary petition for bankruptcy and were adjudi-

cated bankrupts only three days after delivery of the property had been made by them to Swoffords under the contract. But insolvency is not a condition precedent to the filing of a voluntary petition.

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Bankruptcy Act, Sec. 4a.

Even if the petition and order of adjudication could be considered evidence of insolvency at the date made, it would not establish insolvency at any other time, nor render unnecessary the allegations required by the statute as a basis for action on the part of the trustee. The judgment of a court must be grounded upon allegations and proof, and not upon mere speculations. In *Swartz* v. *Frank,* 183 Mo., 438, where an adjudication of bankruptcy had been made upon an involuntary petition, the court was asked by the trustee, in an action to recover an alleged preference, to presume a condition of insolvency only seven days previous; but the court very properly refused so to do, saying (syllabus 4):

"The general rule of law that a state of facts once shown to exist is ordinarily presumed to continue so until the contrary is shown, is not retrospective. Because a company is shown to be insolvent at the time its property was sold by the trustee, it does not follow that it was insolvent seven days before the bankruptcy proceedings were begun, when it made the payment which it is charged was a preference."

See also:

Lawson on Presumptive Evidence, 238;
Jarvis v. *Vandeford,* 116 N. C., 147;
Martyn v. *Curtis,* 67 Vt., 263.

Before any person may attack the disposition of his property by a debtor, actual insolvency must be alleged. And this

is equally true whether the moving party is proceeding under the bankruptcy act or at common law.

That the rights and interests of intervenor have suffered from these erroneous ideas of pleading on the part of the trustee, is evidenced by some of the findings made herein by the court of appeals. For instance, the statements made in finding number five to the effect that at a time when Newtons were insolvent, and Swoffords knew it, the property was surrendered, etc., are findings not warranted by the pleadings, and concerning which there never has been any issues joined or tried. And there are others of a similar nature.

* * * * * * *

Under the laws of Arkansas, as we have shown by the decisions of the highest court of that state, the contract of July 20th, 1904, is valid, and binding between the parties, and valid as well against the trustee. And this is true whether the instrument be construed as a contract of conditional sale or as a mortgage. The stipulation, entered into between Swoffords and the court, without any fraud or deceit on the part of Swoffords, definitely identifies the property in controversy with the contract. The trustee's retention of the property obtained by the receiver under the stipulation is such a ratification of the instrument that it can neither be repudiated nor disputed by him. The decree of the Court of Appeals is, therefore, correct, and should be affirmed by this court.

Respectfully submitted,

ERNEST S. ELLIS,
WEBBER & WEBBER,
Attorneys for Appellee.

EDGAR C. ELLIS,
Of Counsel.

February 10, 1909.